EMERGING PRISONERS' RIGHTS

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I. INTRODUCTION

Until recently the rights of prisoners have been an area of law neglected by both the courts and legal commentators. In the last few years, however, more has been written on the subject than ever before; and the courts have begun to intervene in prison administrative decisions, recognizing rights of inmates that were previously denied them. This article examines legal rights of prisoners and discusses whether the courts have gone far enough in recognizing rights that prisoners retain upon entering a penal institution.

During the last 20 years two significant cases with partially conflicting theories have been cited by many courts in their discussions of internal prison rights of inmates. Often when a court has denied a right[1] it has referred to the theory enunciated in dicta from *Price v. Johnston*[2]:

> Lawful incarceration brings about the necessary withdrawal . . . of many privileges and rights, a retraction justified by the considerations underlying our penal system.[3]

But the conflicting theory often used to justify recognition of a prisoner's claim[4] appears in dicta from *Coffin v. Reichard*:[5]

> A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.[6]

The *Coffin* view presumes that no rights are taken from an inmate unless correctional officials succeed in proving a strong need for so doing. It is submitted that this is to be preferred over the *Price* approach, even though they differ only in emphasis.

The *Price* theory places the burden on the inmate to show why he deserves a right and serves as authority for the denial of various rights to inmates. Nevertheless, both *Coffin* and *Price* involve the same kind of considerations: under *Coffin* one must discover what rights are by necessary implication removed, while under *Price* one must examine the considera-

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1 *See* United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953, 956 (7th Cir. 1956).

2 334 U.S. 266 (1948).

3 *Id.* at 285.

4 *See* Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970).

5 143 F.2d 443 (6th Cir. 1944).

6 *Id.* at 445.

tions which justify a limitation of inmate rights. Because essentially the same considerations underly the recognition of prisoners' rights under either theory, it seems anomalous that one case serves as authority for the denial of various rights and the other for recognition of them. Under either test a court must undoubtedly weigh the considerations on each side, perhaps in the form of a balancing test, to arrive at the appropriate conclusion. Indeed, the courts should ask whether the purposes of the penal system—deterrence, retribution, community safety, and rehabilitation—and the resources of the prison, along with the safety of its personnel and the consideration of basic constitutional values, justify the withdrawal of an individual right from an inmate.[7] This the courts have too seldom done.

To the extent that the *Coffin* rationale differs from its *Price* counterpart, this article adopts it as the preferred view because it places upon the state the burden to show the necessity for withdrawing any individual right from an inmate and seems to presume the loss of fewer rights than does the *Price* view. Many courts today seem to be adopting this position. In addition, there are a number of other reasons for preferring the *Coffin* view.

A. *The Coffin Rationale Is Preferred*

The eroding strain of legal theory that denoted a prisoner as a "slave of the State"[8] can no longer be justified. A number of reasons underly the emerging acceptance of the *Coffin* reasoning as the preferred view of prisoner's rights and the rejection of the slave doctrine.

1. The American Legal Tradition Presumes that Individual Rights are Retained

The Declaration of Independence long ago stated the belief that "all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are life, liberty and the pursuit of happiness." That document had its basis in the Western intellectual tradition, which emphasizes the intrinsic worth of the individual and the retention of individual rights.[9] In Mill's famous essay, *On Liberty*, the thesis which emerges is based on this tradition and argues for limiting the power which can legitimately be exercised by society over the individual. Moreover, the principle toward which the argument moves is still accepted, that is, the essential importance of human development in its richest diversity.[10]

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[7] Courts often use the *Price* dicta as authority for denial of a right with the justification that denial is in the best interests of security and discipline within the institution. But this analysis is inadequate without an examination of how security and discipline are affected.

[8] Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

[9] *See generally* MILL, *On Liberty*, ESSAYS (1935); C. BECKER, THE HEAVENLY CITY OF THE 18TH CENTURY PHILOSOPHERS (1935).

[10] 43 GREAT BOOKS OF THE WESTERN WORLD 267 (1952).

This intellectual and political theory is not limited to some groups, while excluding others such as prisoners. As the TASK FORCE REPORT commented:

> A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual no matter how degenerate. It is a radical departure from that tradition to accept for a defined class of persons, even criminals, a regime in which their right to liberty is determined by officials wholly unaccountable in the exercise of their power. . . .[11]

George Bernard Shaw echoed this tradition in *The Crime of Imprisonment*,[12] in which he concluded that imprisonment cannot be fully understood by those who do not understand freedom:

> Any specific liberty which the criminal's specific defect lead him to abuse, will, no doubt, be taken from him; but if his life is spared his right to live must be accepted in the fullest sense, and not, as at present, merely as a right to breathe and circulate his blood. In short, a criminal should be treated, not as a man who has forfeited all normal rights and liberties by the breaking of a single law, but as one who, through some specific weakness or weaknesses, is incapable of exercising some specific liberty or liberties.[13]

2. The *Coffin* View is Preferred in Terms of the Overriding Correctional Rationale of Rehabilitation

"The ultimate goal of corrections under any theory is to make the community safer by reducing the incidence of crime. Rehabilitation of offenders to prevent their return to crime is in general the most promising way to achieve this end."[14] This position concisely states the focus of the Crime Commission's work in the *Task Force Report*. The entire emphasis that consistently appears throughout its pages is that in order to achieve the benefits of rehabilitation of the "collaborative regime," the inmates should be treated more humanely and should retain a greater number of individual freedoms. Although imprisonment requires a certain amount of regimentation that is unavoidable in an enforced community (as *Coffin* recognizes), "[f]ew criminologists would disagree with the proposition that any additional amount of deprivation imposed on prisoners is unnecessary or even detrimental and should, therefore be avoided."[15]

Indeed, after reading a work like Menninger's *The Crime of Punish-*

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[11] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 83 (1967) [hereinafter cited as TASK FORCE REPORT].

[12] G. SHAW, THE CRIME OF IMPRISONMENT (1946).

[13] *Id.* at 124.

[14] TASK FORCE REPORT: *supra* note 11, at 16. *See* Nolan v. Smith No. 6228 (D. Vt. June 29, 1967) where Circuit Judge Oakes, sitting by designation, said, "There is no question that rehabilitation, not revenge, must be the principle aim of penology."

[15] Mueller, *Punishment, Corrections and the Law*, 45 NEB. L. REV. 58, 78 (1966).

ment[16] one comes to the realization that the majority of practices in our prisons, which today limit the rights of inmates and regiment their lives, only dehumanize and destroy and are in no way rationally related to rehabilitation. Thus, Menninger concludes that imprisonment "is a creaking, groaning monster through whose heartless jaws hundreds of American citizens grind daily, to be maimed and embittered so that they emerge implacable enemies of the social order and confirmed in their 'criminality.' "[17] This denial of many rights retained by free man gives impetus to his contention that:

> The psychological state of complete passivity and dependence on decisions of guards and officers . . . [t]he frustation of the prisoner's ability to make choices . . . involve a profound threat to the weak, helpless, dependent status of childhood. . . . The imprisoned criminal finds his picture of himself as a self determining individual being destroyed by the regime of custodians.[18]

Consequently, when one realizes that a harsh, custodial regime, where a prisoner is bereft of most rights, does not effectively rehabilitate,[19] one sees that we must alter our prisons to be more human and more like our open, free society if we are to meet our burden of rehabilitation.[20] The Chief Justice of the United States has epitomized our duty:

> We take on a burden when we put a man behind walls and that burden is to give him a chance to change. If we deny him that, we deny his status as a human being, and to deny that is to diminish our own humanity and plant seeds of future anguish for ourselves.[21]

3. The *Coffin* View May Further the Processes of Orderly Correctional Administration

Recent prison riots throughout the country suggest that repressive, custodial practices of incarceration will no longer be tolerated by prisoners. Thus, a recent study challenges the traditional theory that tight control of prisoners is needed and that many individual rights must be suppressed in order to operate prisons; instead, it suggests that perhaps the opposite is true, pointing to the many recent prison riots in institutions run in the traditional manner.[22]

The *Task Force Report*[23] suggests that the emphasis on the authoritarian

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[16] K. MENNINGER, THE CRIME OF PUNISHMENT (1968).

[17] *Id.* at 89.

[18] *Id.* at 74-75.

[19] *See generally* TASK FORCE REPORT, *supra* note 11.

[20] *See* W. GLASER, THE EFFECTIVENESS OF OUR PRISONS AND PAROLE SYSTEM, (1964).

[21] From a speech by Chief Justice Burger to the A.B.A., reported in the Boston Globe, Feb. 21, 1971, at 6-A, col. 1.

[22] From tentative conclusions of a Study of the Adult Correctional Institution at Cranston, R.I., by the Harvard Criminal Justice Center. To be published in J. CRIM. L.C. & P.S.

[23] TASK FORCE REPORT, *supra* note 11.

nature of prisons leads to a subculture of inmate relationships "founded on violence and corruption."[24] Moreover, it suggests that the development of myriad rules and strict enforcement of them leads to inmate efforts to avoid them, so that these prison regulations "do not clearly decrease the amount of disorderly or even dangerous behavior."[25] Consequently, much administrative time is wasted in monitoring the deprivation of rights to little or no apparent benefit. Therefore, the *Task Force Report* concludes, consistent with the *Coffin v. Reichard*[26] theory, that granting inmates more rights is a preferred practice in terms of orderly prison administration:

> Therefore, a first principle for any correctional institution is that staff control can be greatest, and certainly inmate life will be most relevant to that in the free community, if rules regulating behavior are as close as possible to those which would be essential for law and order in any free community, together with such minimal additional rules as are essential to meet the conditions peculiar to the institution.[27]

B. *There is a Trend Toward Recognition of the Coffin View of Inmate Rights*

In the last few years many courts have accepted the outlook suggested by *Coffin* and have added to the general trend toward the expansion of internal prison legal rights for inmates. Quite often this has resulted in a court's intervention, or review of, the decisions of correctional administrators. Although this article is not directly concerned with that trend, but rather with the considerations indicating what legally enforceable rights inmates should and do possess, nevertheless a brief look at the reasons for this increased intervention and recognition of rights will place the entire discussion in better perspective.

1. Increased Use of the 1871 Civil Rights Act (42 U.S.C. § 1983) by Inmates Has Expanded the Scope of Their Protected Rights

Before 1961, any complaint alleging the denial of a right brought by a state prisoner generally had first to be litigated in a state court.[28] However, in that year *Pierce v. LaVallee*[29] held that a suit brought under 42 U.S.C. § 1983 which alleged the impairment of religious freedom would not automatically be denied a hearing in federal court. Subsequently, the Supreme Court in *Cooper v. Pate*[30] appeared to reject the abstention doc-

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[24] *Id.* at 47.

[25] *Id.* at 50.

[26] 143 F.2d 443 (6th Cir. 1944).

[27] TASK FORCE REPORT, *supra* note 11, at 50.

[28] 6 CRIM. L. BULL. § 2 (June 1970).

[29] 293 F.2d 233 (2d Cir. 1961).

[30] 378 U.S. 546 (1964).

trine in § 1983 prisoner actions,[31] and in *Houghton v. Shafer*,[32] the Court finally declared that exhaustion was not applicable to such suits. These declarations have made it much easier for a state prisoner to present his claims before a federal court and have made this statute the preferable form of action for a state prisoner[33] because the exhaustion doctrine in habeas corpus actions still exists and because some courts still adhere to the total release rule. Moreover, because the Second Circuit has upheld the judgment of compensatory damages against a prison warden in *Sostre v. McGinnis*,[34] more § 1983 suits seeking damages than in the past can be expected—another reason why state prisoners might prefer this form of action. Other reasons for the increased recognition of rights under § 1983 are the recognition of the intent of the 1971 Civil Rights Act to include relief in this kind of case, the increased emphasis on inmate rehabilitation, and judicial notice of inadequate prison conditions.[35]

2. The Recognition of Rights for the Disadvantaged is a Societal Trend

Increased intervention in prison administration by the courts can be seen as part of the recent judicial trend to examine and expand the constitutional rights of many disadvantaged groups in society. Recognizing the rights of black persons,[36] students,[37] welfare recipients,[38] servicemen,[39] draftees,[40] juveniles,[41] women,[42] and mental patients[43] evidences a societal trend toward greater concern for the disadvantaged. It would be surprising, therefore, if prisoners were omitted from this trend.

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[31] 6 CRIM. L. BULL. § 2 (June 1970).

[32] 392 U.S. 639 (1968).

[33] Section 1983 does not apply to prisoners in federal custody. Recently, the Second Circuit placed some restrictions on such a suit when it ruled, in a case where the district court ordered a restoration of "good time" resulting in the plaintiff's release from custody in a § 1983 suit, that the plaintiff had to exhaust his remedies—since the suit sought relief from custody, it was essentially a habeas corpus action, and the habeas corpus exhaustion requirement could not be circumvented. Rodriquez v. McGinnis, 9 CR. L. REP. 2050 (2d Cir. Jan. 16, 1971); *accord*, United States *ex rel.* Katzoff v. McGinnis, 441 F.2d 558 (2d Cir. 1971) (habeas corpus is not limited to attacks on custody because of defects in the original conviction, but applies to the failure to allow release according to law). *Contra*, Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971). For a good discussion of when exhaustion should apply in an inartfully pleaded prisoner suit that could be interpreted as either a habeas corpus or a Civil Rights Act suit, *see* Edwards v. Schmidt, 321 F. Supp. 68 (W.D. Wis. 1971).

[34] 442 F.2d 178 (2d Cir. 1971).

[35] 6 CRIM. L. BULL. § 2 (June 1970).

[36] Brown v. Board of Education, 347 U.S. 483 (1954).

[37] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[38] Goldberg v. Kelly, 397 U.S. 254 (1970).

[39] O'Callahan v. Parker, 395 U.S. 258 (1969).

[40] Oestereich v. Selective Service System Local Bd. No. 11, 393 U.S. 233 (1968).

[41] *In re* Gault, 387 U.S. 1 (1967).

[42] Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

[43] Baxstrom v. Herold, 383 U.S. 107 (1966).

3. "Total Release" is Adhered to Less Strictly

The courts now less frequently condition the grant of habeas corpus relief on the "total release" doctrine and give greater recognition to its flexibility as a remedy.[44] The traditional view of "total release" was advanced in *Ex parte Pickens*,[45] where a district court in Alaska recognized that a filthy, 27 square foot jail holding 40 persons without adequate facilities or ventilation was "not fit for human habitation." Nevertheless, the court saw no remedy other than the total discharge of the petitioner with all the other prisoners to follow—a result which it would not order —consequently, it ordered no relief. But, numerous courts today use habeas corpus for remedies other than total release.[46] Many federal courts use the provisions of 28 U.S.C. § 2243 (habeas corpus), authorizing disposition of a case "as law and justice require," to grant remedies such as discharge from solitary confinement.[47] Habeas corpus has been used also to grant relief without release in cases dealing with freedom of religion,[48] access to one's attorney in private,[49] religious dietary practices,[50] the abridgement of access to the courts,[51] and a rule restricting the possession of legal papers.[52] Consequently, it might easily be concluded that:

> Habeas corpus is being gradually expanded beyond its traditional limits, . . . and courts are beginning to examine the *manner* in which an inmate is held or treated even though his sentence and commitment are concededly valid.[53]

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[44] *See* Note, *Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

[45] 101 F. Supp. 285 (D. Alas. 1951). *See also Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830); Williams v. Steele, 194 F.2d 32 (8th Cir. 1952); Snow v. Roche, 143 F.2d 718 (9th Cir. 1944); Stroud v. Johnston, 139 F.2d 171 (9th Cir. 1943).

[46] Perhaps *Coffin* was one of the first cases to use habeas corpus in this manner, when the court recognized that: "The fact that a person is legally in prison does not prevent the use of habeas corpus to protect his other inhrent rights." 143 F.2d at 445.

[47] Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966), *rev'd*, 382 F.2d 353 (6th Cir. 1967), *rev'd*, 393 U.S. 483 (1969); Wainwright v. Coonts, 409 F.2d 1337 (5th Cir. 1969).

[48] Konigsberg v. Ciccone, 285 F. Supp. 585 (W.D. Mo. 1968) (although not for past wrongs); *In re* Ferguson, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753 (1961).

[49] *In re* Rider, 50 Cal. App. 797, 195 P. 965 (1920).

[50] Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969).

[51] *Ex parte* Hull, 312 U.S. 546 (1941).

[52] *In re* Harrell, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970).

[53] Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 254 (1970) [hereinafter cited as Jacob].

The Supreme Court has made it clear that habeas corpus is an appropriate method of attacking conditions of confinement. In Wilwording v. Swenson, 404 U.S. 249 (1971), an inmate brought a habeas petition attacking both the living conditions and disciplinary procedures in prison. The Court, in reversing a denial of the petition, stated that, "Moreover, although cognizable in federal habeas corpus, *see* Johnson v. Avery, 393 U.S. 483 (1969), petitioner's pleading may also be read to plead causes of action under the Civil Rights Act . . . for deprivation of constitutional rights by prison officials." *See also* Rodriquez v. McGinnis, 40 U.S.L.W. 2535 (2nd Cir. Jan. 25, 1972).

4. "Hands-off" and "Federal Abstention" are Eroding Doctrines in the Area of Prisoners' Rights

Although traditionally courts were reluctant to inquire into prison conditions because of a "hands-off" or "exceptional circumstances" doctrine which suggested deference to correctional administrators and regulations, this doctrine now has lost much of its force. Previously, the result of this doctrine was that "[w]hatever rationale is employed, the prisoner, because of his status as a convict, is unable to enforce even his protected rights absent a showing of extraordinary circumstances."[54] This failure to grant relief "appears to stem from a conviction held with virtual unanimity by the courts that it is beyond their power to review the internal management of a prison system."[55] Illustrating that this doctrine could prevent a court from examining even the allegations of a complaint, the Eighth Circuit in *Williams v. Steele*,[56] a case in which an inmate complained of harsh mistreatment, denied relief, blithely stating that "[s]ince the prison system of the United States is entrusted to the Bureau of Prisons under the direction of the Attorney General . . . the courts have no power to supervise the discipline of the prisoners nor to interfere with their discipline. . . ."[57]

Now, however, an examination of the types of complaints being adjudicated and examined by the courts illustrates that the "courts [are] . . . replacing the 'hands off' approach with a determination of the reasonableness of the regulation."[58] Less frequently do they refuse to examine a complaint. For example, in *Pierce v. LaVallee*[59] a court investigated complaints of religious persecution and solitary confinement; in *Barnett v. Rodgers*[60] a court scrutinized the reasonableness of an inmate's diet; and in *Sostre v. Rockefeller*[61] a court examined allegations of many kinds of unfair deprivations. Recently the Supreme Court rejected the "exceptional circumstances" doctrine in *Haines v. Kerner*,[62] a case in which an inmate had been placed in solitary confinement as a disciplinary measure. His § 1983 complaint alleged a denial of due process in the steps leading to his confinement and physical injuries suffered as result of conditions in the isolation cell. The district court had granted the defendant's motion to dismiss,

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54 6 CRIM. L. BULL. § 2 (1970).

55 Comment, *Beyond the Ken of the Court: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 508 (1963).

56 Williams v. Steele, 194 F.2d 32 (8th Cir. 1952).

57 *Id.* at 34. *See also* Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963).

58 Note, *Problems of Modern Penology: Prison Life and Prisoners' Rights*, 53 IOWA L. REV. 671, 671-72 (1967) [hereinafter cited as Note].

59 293 F.2d 233 (2d Cir. 1961).

60 410 F.2d 995 (D.C. Cir. 1969).

61 312 F. Supp. 863 (S.D.N.Y. 1970).

62 40 U.S.L.W. 4156 (U.S. Jan. 13, 1972).

> suggesting that only under exceptional circumstances should courts inquire into the internal operations of state penitentiaries and concluding that petitioner had failed to show a deprivation of federally protected rights. The Court of Appeals affirmed, emphasizing that prison officials are vested with "wide discretion" in disciplinary matters.[63]

The Supreme Court reversed, stating, "Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence."[64]

Finally, the federal abstention doctrine that "[p]rinciples of federalism prevent federal courts from exercising supervision over state prisons"[65] seems to be going the way of the "hands-off" doctrine. In *United States ex rel. Morris v. Radio Station WENR*[66] the court succinctly enunciated the principles of federalism doctrine: "Inmates of State penitentiaries should realize that prison officials are vested with wide discretion in safeguarding prisoners committed to their custody. Discipline reasonably maintained in State prisons is not under the supervisory direction of federal courts."[67] Often this doctrine is applied to cases that would involve the possible disruption of a complex state administrative process,[68] perhaps one such as the administration of state prisons. But the fact that nearly all the recent cases expanding the rights of prisoners are cases in the federal courts dealing with state prisoners illustrates that this abstention doctrine has now become less important in prisoners' rights cases than ever before.[69]

Perhaps the demise of both the "hands-off" and federal abstention doctrines was best stated by Judge Foley in the recent case of *Wright v. McMann*:[70]

> No longer can prisons and their inmates be considered a closed society

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[63] *Id.* For other cases in accord with the court of appeals view, see Adams v. Pate, 445 F.2d 105 (7th Cir. 1971); Wilwording v. Swenson, 439 F.2d 1331 (8th Cir. 1971), *rev'd*, 404 U.S. 249 (1971).

[64] 40 U.S.L.W. 4156, 4157 (U.S. Jan. 13, 1972).

[65] Jacob, *supra* note 53, at 228 n.3.

[66] 209 F.2d 105 (7th Cir. 1953). *See also* United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956); Siegel v. Ragen, 88 F. Supp. 996 (N.D. Ill. 1949).

[67] 209 F.2d at 107. For additional cases rejecting the abstention doctrine see Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Valvano v. McGrath, 325 F. Supp. 408 (E.D.N.Y. 1971); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, No. 71-1865 (6th Cir. Mar. 14, 1972).

[68] Alabama Public Service Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

[69] *See, e.g.*, Sostre v. McGinnis, 334 F.2d 906 (2d Cir. 1964); Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970).

[70] 321 F. Supp. 127 (N.D.N.Y. 1970).

> with every internal disciplinary judgment to be blissfully regarded as immune from the limelight that all public agencies ordinarily are subject to.[71]

The following sections of this article discuss areas of law that have been litigated by prisoners who asserted that in some way they had been denied a right that they should possess. In nearly all of these areas the courts have recognized to some extent that the inmate is not totally bereft of rights. What follows is an outline of the current state of the law for each particular area of prisoners' rights and an analysis of whether that area has been properly dealt with by the courts. In addition, consideration is given to the sufficiency of the reasons asserted to justify the withdrawal of rights which an inmate would possess if he were outside the prison walls. Because each area of law is treated separately, the student of this area of law may not get a strong idea of the relative importance of these asserted rights in any scheme of societal and constitutional values. Needless to say, however, the extent to which any claim is upheld by the judiciary it becomes a substantive right whose exercise is very important to the claimant.

Finally, it is possible to make some general statements about the relative position of at least those prisoners' rights considered herein. Two kinds of rights stand out as being of extreme importance. First, the exercise of all rights ultimately depends upon both the right to access to the courts and the right to medical care: without access to the courts a prisoner could not gain the recognition of any other right and would be totally subject to the whim of the prison administrators; without medical care the enjoyment of other rights could prove meaningless. Second, rights closely related to the exercise of first amendment freedoms do not seem to be significantly less important than the rights to access and medical care for the reason that these freedoms have always occupied a preferred position in American values. Indeed, the interests protected by the first amendment would seem to be present in prison just as in free society. Thus, prisoners' first amendment rights encompass at least the belief and exercise of religion, as well as the rights to speak and hear that are present in the free use of the mail. It is perhaps harder to differentiate other areas of inmate rights in degrees of importance; nevertheless, the exercise of any of them cannot be deemed unimportant, particularly since there are constitutional commands present in nearly all. The right to be free from cruel and unusual punishment or the prohibition against racial discrimination are important values that have frequently been litigated in a prison context. In addition, there has been a recent societal trend to expand procedural due process rights for many groups, and no strong reasons exist to justify the exclusion of prisoners from this trend. It would be very difficult to

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[71] *Id.* at 132.

designate any one of these areas as more important than another, for all rights expressing constitutional values are important in themselves.

II. RELIGION

A. *State of the Law*

In the last decade there has probably been more litigation over the religious rights of inmates and the development of a more coherent body of law than in any other area of prisoner's rights.

> Of all the problems affecting both prison population and prison administrators, the problem concerning religious exercise has enjoyed the most litigation, publicity and growth and expansion as a legal concept in recent years.[72]

The major part of this expansion was effected by litigation initated by Black Muslims[73] and has led to the general recognition of religious rights of many kinds. The paucity of decisions within the past year suggests that litigation over this right may be near its end.

1. Right to Equal Religious Treatment

Many of the early Muslim cases considered the now well-established right of Muslims to be recognized as a religious group. In *Sewell v. Pegelow*,[74] Muslim prisoners alleged that because of their religious beliefs they had been isolated, deprived of rights, discriminated against, and refused the right to practice their beliefs. The court held that a cause of action was stated, deciding that "the allegations generally of hardships and deprivations inflicted soley because of petitioners' religious faith stated a claim under the Constitution and required a hearing on the merits."[75] The Seventh Circuit, in *Cooper v. Pate*,[76] refused to recognize the Black Muslims as a legitimate religious group and affirmed denial of any relief. The Supreme Court, however, reversed.[77] Subsequently, the Seventh Circuit held that the district court properly enjoined prison officials from refusing the plaintiff and other members of the Muslim sect the right to communicate by mail, to visit with ministers of their faith, and to attend Muslim religious services.[78] These and other cases have recognized the Black Muslims as a religious group and have granted them various forms

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[72] Comment, *The Rights of Prisoners While Incarcerated*, 15 BUFF. L. REV. 397, 418 (1965) [hereinafter cited as Comment].

[73] *See, e.g.*, Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961).

[74] 291 F.2d 196 (4th Cir. 1961).

[75] Comment, *Black Muslims in Prison: On Muslim Rites and Constitutional Rights*, 62 COLUM. L. REV. 1488, 1493 (1962) [hereinafter cited as Comment].

[76] 324 F.2d 165 (7th Cir. 1963).

[77] 378 U.S. 546 (1964) (per curiam).

[78] 382 F.2d 518 (7th Cir. 1967).

of relief.[79] Consequently, there is now no real issue concerning the legitimacy of Black Muslim religious rights in prison.

Many other cases, usually involving the Black Muslims, have established the principle that prisoners are entitled to equal religious treatment. Thus, in *Cooper v. Pate*, the court said:

> Courts will closely scrutinize the reasonableness of any restriction imposed on a prisoner's activities in the exercise of his religion, and especially so where the adherents of one faith are more heavily restricted than the adherents of another.[80]

In *Long v. Parker*,[81] another case in which an order denying relief was vacated by the Supreme Court, Muslim plaintiffs alleged that they could not use the prison chapel, could not possess the Koran, were not permitted to wear religious medals, were not provided ministers, and were not given Muslim dietary staples. The circuit court subsequently ordered a hearing to determine whether the appellants were discriminated against and stated that they were entitled to receive equal treatment and that members of their faith have an absolute right to be free from discrimination because of their beliefs:

> [W]here, however, the charge is made that the regulations . . . fall more harshly on adherents of one faith . . . the courts will scrutinize the reasonableness of such regulations.[82]

Konigsberg v. Ciccone[83] illustrates that the right to equal treatment does not belong to Muslims alone. In *Konigsberg* the plaintiff alleged religious discrimination because in order to attend religious services he, a Jew, was required to have a special pass while Catholics and Protestants were not. Consequently, he was unable to attend services from the segregation unit he occupied because he could not get a pass, whereas inmates of other faiths (which had a greater number of adherents) could leave the segregation unit. The court held that Konigsberg was to be allowed to attend religious services while he was in the segregation section, unless the officer in charge indicated at that time that such attendance would present a great security risk.[84]

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[79] *See* Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964); Shaw v. McGinnis, 14 N.Y.2d 864, 200 N.Y.2d 636, 251 N.Y.S.2d 971 (1964).

[80] 382 F.2d at 521.

[81] 351 F.2d 950 (3d Cir. 1965), *vacated*, 384 U.S. 32 (1966).

[82] Long v. Parker, 390 F.2d 816, 820 (3d Cir. 1968).

[83] 285 F. Supp. 585 (W.D. Mo. 1968). *See also* Cruz v. Beto, 40 U.S.L.W. 3452 (5th Cir. Mar. 20, 1972), where the Supreme Court vacated a judgment dismissing a complaint alleging denial of equal religious treatment to a Buddhist inmate. The Court said, "If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpably discrimination by the State against the Buddhist religion. . . .

[84] For other equal treatment cases see Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964);

Case law indicates further that it is not permissible to punish an inmate solely for his religious beliefs or for his attempts to practice those beliefs in ways that do not gravely threaten disorder in the prison. In *Pierce v. LaVallee*,[85] the plaintiff was denied permission to purchase the Koran and to contact his spiritual advisor. He alleged that he was subjected to solitary confinement and lost "good time" because of this attempt to exercise his belief. The court held that solitary confinement and loss of good time imposed as a result of religious belief is not a matter of prison discipline reviewable only in the state courts and that the allegation stated a claim upon which relief could be granted. In a similar case, an inmate had been subjected to four years solitary confinement for refusing to tell the warden the names of the inmates for whom he spoke after he requested and was denied the opportunity for Black Muslim worship. The court ordered the prisoner released into the general population, saying:

> A prisoner is not bereft of all his rights. Included among those retained is an immunity from punishment for making a reasonable attempt to exercise his religion, even a religion that to some of us may seem strangely confused and irrational.[86]

These cases represent the general position of the courts but are by no means the only cases standing for this principle.[87]

2. Right to a Minister, Religious Publications, and Religious Diet

Prisoners cannot be denied visits by ministers;[88] moreover, it is clear that adherents to the Muslim faith must be allowed visits by Muslim ministers.[89] Although a court recently held that a Jewish prisoner was not denied his religious freedom by the prison's failure to have a rabbi on the prison premises, the prison had recently been negotiating to hire a rabbi on a part-time basis because the small number of Jewish inmates purportedly did not justify a full-time rabbi.[90] Nevertheless, a number of cases make it apparent that most courts will protect an inmate's right to have contact with a minister,[91] unless practical considerations render this impossible or unless religious meetings proceed along nonreligious lines

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Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); State v. Cubbage, 210 A.2d 555 (Super. Ct. Del. 1965).

[85] 293 F.2d 233 (2d Cir. 1961).

[86] Howard v. Smyth, 365 F.2d 428, 431 (4th Cir. 1966).

[87] *See, e.g.*, Williford v. California, 352 F.2d 474 (9th Cir. 1965); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961).

[88] Long v. Parker, 390 F.2d 816 (3d Cir. 1968).

[89] Brown v. McGinnis, 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962).

[90] Gittlemacher v. Prasse, 428 F.2d 1 (3d Cir. 1970).

[91] Northern v. Nelson, 315 F. Supp. 687 (N.D. Cal. 1970), *aff'd*, 448 F.2d 1266 (9th Cir. 1971); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964).

or become unruly.[92] In *Cooper v. Pate*,[93] for example, the Seventh Circuit enjoined officials from refusing to allow Muslims to visit with ministers of their faith and from prohibiting inmate attendance at services conducted by a recognized Muslim minister. Recently, a federal district court ordered that San Quentin make available the services of a Black Muslim minister at the same hourly rates paid to Catholic, Jewish, and Protestant chaplains.[94]

The right to receive and possess religious literature is an area of law in which there has not been much litigation. Two early cases permitted prison officials to deny inmates the right to receive such literature because it was found not to be an unreasonable exercise of discretion on the ground that the presence of such material might be inflammatory and cause disruption.[95] Presumably, the authorities would have had no reason to bar other, more conventional religious material. Recent cases indicate, however, that the law is changing in this area. In *Walker v. Blackwell*[96] the court held that inmates were entitled to receive the newspaper *Muhammad Speaks* and that they could correspond directly with Elijah Muhammad for the limited purpose of seeking spiritual advice.[97] *Knuckles v. Prasse*[98] indicated that the clear and present danger test applied to religious practices in prison and that this test must apply to Muslim religious literature as well. Nevertheless, the court held that since one interpretation of the publications was that they urged defiance, they could therefore be prohibited under the clear and present danger test.

Although the question of an inmate's right to receive a special religious diet has recently arisen in a number of Black Muslim cases, no clear principle of law has emerged. In *Childs v. Pegelow*[99] an action was brought to enforce the superintendent's alleged promise to provide a pork-free meal after sunset during Ramadan, but the court denied relief on the ground that the claim did not rise to a constitutional level. The court in

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92 Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1970), *cert. denied*, 402 U.S. 936 (1971).

93 382 F.2d 518 (7th Cir. 1967).

94 Northern v. Nelson, 315 F. Supp. 687 (N.D. Cal. 1970).

95 Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); *In re* Ferguson, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753 (1961).

96 411 F.2d 23 (5th Cir. 1969).

97 Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968) held that an inmate was not entitled to receive religious publications because the prison officials considered them inflammatory and subversive of discipline and that such censorship was solely within the discretion of the state officials. The Fourth Circuit recently changed its position in Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971), where the court placed the burden on the state to justify the censorship of Black Muslim publications and said that the exercise of religious freedom (here, receipt of the publications) may be restricted only upon the showing of a compelling state interest. Referring to its decision in *Abernathy*, the court indicated that times have changed and recognized that prisons have had more experience with the effect of Muslim publications.

98 302 F. Supp. 1036 (E.D. Pa. 1969).

99 321 F.2d 487 (4th Cir. 1963).

Walker v. Blackwell[100] denied a similar request. On the other hand, although a request for a pork-free meal was denied in *Abernathy v. Cunningham*,[101] it was denied only on the grounds that the inmate could already choose pork-free food and still receive a balanced diet. In *Banks v. Havener*[102] the court ordered plaintiffs' counsel to prepare an order permitting plaintiffs to practice their religion and one form of relief which had been sought was consideration of certain Muslim dietary practices. Finally, *Long v. Parker*[103] reversed the lower court's denial of relief and remanded for a hearing to determine whether the appellants had suffered discrimination by the refusal of prison officials to accommodate their special Muslim dietary needs.

The opinion which appears to be the best reasoned of the dietary cases involved a prayer for an order that the superintendent of the District of Columbia jail respect Muslim inmates' dietary needs to the extent of providing at least one pork-free meal each day and coffee three times per day.[104] It was not contended that the food policy was applied to plaintiffs in a discriminatory way, but plaintiffs did show that perhaps two-thirds of all meals were served with, contained, or were cooked with pork or pork grease. In reversing dismissal of the claim, the court did not reach the question of a violation of constitutional rights, but said that the lower court must determine if impediments to the observance of the Muslim dietary creed had a compelling justification and whether or not it was possible to pursue a food policy with a less strifling effect on the plaintiff's exercise of religion.

> To say that religious freedom may undergo modification in a prison environment is not to say that it can be suppressed or ignored without adequate reason. . . . [The administration has a responsibility] to reduce the resulting impact upon those rights to the fullest extent consistent with the justified objective.
>
> . . . There is no finding as to whether any particular "considerations . . ." warrant the tax on conscience that the jail's food service policies require appellants to endure. Nor is there a finding as to whether that program could not be administered in such a way as to lighten or eliminate its burden on free religious exercise. . . .
>
> . . . [The menus were prepared] without respect for the fact that some prisoners cannot dine on pork. . . .
>
> . . . [If a prisoner's request is feasible], it represents the bare minimum that jail authorities . . . are constitutionally required to do . . . for any group of inmates with religious restrictions on diet.[105]

Although religious belief is probably an absolute right even in prison,

[100] 411 F.2d 23 (5th Cir. 1969).

[101] 393 F.2d 775 (4th Cir. 1968).

[102] 234 F. Supp. 27 (E.D. Va. 1964).

[103] 390 F.2d 816 (3d Cir. 1968).

[104] Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969).

[105] *Id.* at 1000-01.

the exercise of particular religious customs is not absolute, for these are subject to reasonable regulation and can be lost if abused. "[I]n a prison situation where the free exercise of religious beliefs could be a threat to discipline, it is recognized that curbs are both necessary and constitutionally proper."[106] The courts have made this position clear. In *Banks*, the court held that inmates must be allowed to practice their religion where there was no clear and present danger of disturbance, but warned:

> Lest there be no misunderstanding, the practice of this right (religious freedom) in a penal institution is not absolute—it is subject to rules and regulations necessary to the safety of the prisoners and the orderly functioning of the institution.[107]

In *Cooper*, the court said that the authorities have the discretion to exclude those whose past record demonstrates a high probability to misuse the opportunity for worship.[108] But most often the requisite test for denial of this first amendment right has been stated strictly. Thus, although the court in *Long v. Parker*[109] held Muslim religious practice subject to reasonable regulation, it also held that religious literature could be excluded only if it constituted a clear and present danger; and *Knuckles v. Prasse*[110] applied this test to both the introduction of religious literature and the practice of religion.

B. *New Directions for the Law*

When dealing in the first amendment area of religious practice in prison, it should be remembered that the first amendment freedoms enjoy a preferred position to all other rights.[111] The "freedom of speech and of press, of assembly, and of worship may not be infringed on . . . slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."[112] The second basic principle that applies in dealing with religion and the first amendment is that "the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[113] Consequently, when considering what rights under *Coffin* should be recognized as necessarily taken from an inmate, the test in the first amendment area must be stringent and the state interests in restricting religious practices must be compelling, particularly

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[106] Comment, *supra* note 72, at 419.

[107] Banks v. Havener, 234 F. Supp. 27, 31 (E.D. Va. 1964).

[108] 382 F.2d 518, 523 (7th Cir. 1967). *But see* McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (App. Div. 1957).

[109] 390 F.2d 816 (3d Cir. 1968).

[110] 302 F. Supp. 1036 (E.D. Pa. 1969).

[111] *See, e.g.*, Thomas v. Collins, 323 U.S. 516 (1945).

[112] West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

[113] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

if we accept the oft-stated precept that religion tends to assist rehabilitation.[114]

One justification almost always offered in Muslim religious cases is that the exercise of that religion tends to cause disruption and breach of peace.[115] Sometimes the official rationale for withdrawing a right is that it would be costly to provide it[116] or, as in the dietary cases, both costly and administratively burdensome. But are any of these state interests sufficiently strong to overcome the individual's right to practice his religion? Although some discretion must necessarily be granted to prison officials, for they are best qualified to testify to the chances of a practice causing prison disorder and disruptions, nevertheless, there seems to be no reason why they should not be required to furnish the court with objective reasons for any such belief.

As a first principle, the freedom to exercise religion in prison cannot be an absolute right, for it is not absolute even in the outside world. On the other hand, the exact opposite should be true of the freedom to believe in a particular religion, which would seem to be guaranteed by the equal protection clause. Thus, even though it can be argued that belief in the Muslim religion might lead to disruptive prison behavior,[117] the state does have available the less restrictive alternatives of punishing any actual disruptive behavior or of prohibiting any particular religious practice which has frequently in the past lead to disorder. This is the least that seems to be required by the strong commands of the equal protection clause and the first amendment.

> [I]n examining the justification for state infringement in the [area of] First Amendment [freedom], the Supreme Court has recognized and declared the principle that the means utilized by the state, as well as the ends, must be legitimate. Even the most legitimate of legislative ends cannot justify the endorcement of fundamental rights of individual citizens if these ends may be accomplished by the use of less restrictive alternative means which result in less invasion of these fundamental rights.[118]

Nevertheless, there must be some limit on the exercise of religious belief in prison, for the state has a legitimate interest in avoiding inflammatory situations.

> The community of the free world has a built-in escape valve in the unrestricted [freedom of] movement of its members. As a result those who find themselves approaching the brink of violent action can unrestrainedly turn to innumerable other activities. Not so in a prison. Generally speak-

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[114] *See generally* State v. Cubbage, 210 A.2d 555 (Super. Ct. Del. 1965); Comment, *supra* note 75, at 1500; *cf.* THE AUTOBIOGRAPHY OF MALCOM X (1964).

[115] Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

[116] Gittlemacher v. Prasse, 428 F.2d 1 (3d Cir. 1970).

[117] Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

[118] Jackson v. Godwin, 400 F.2d 529, 541 (5th Cir. 1968).

> ing the prison community is composed of irresponsible and emotionally immature individuals . . . . Thus the essential problem of the prison community is that of maintaining an orderly institution which confines and houses those who have a natural and acquired abhorrence of confinement and a repulsiveness for the authority keeping them confined.[119]

So the really difficult questions are deciding how and to what degree correctional officials can restrict the exercise of religious beliefs; and although the courts will "closely scrutinize"[120] any restriction on prison religious activity, there are ways that such scrutiny could be ineffective. Even under the "clear and present danger"[121] formula, if courts merely accept statements of prison officials that a practice constitutes a clear and present danger to institutional order and safety, the test would be useless. Official assertions of a danger to security or discipline have all too often been accepted without question by the courts in the past. Therefore, the courts must make their own judgments as to the need for a restriction, presumably basing their decisions on objective indicia offered by officials on the need for curtailing religious activity. Otherwise, any "clear and present danger" test will prove meaningless.

There seems to be no reason why the courts should not require such indicia in first amendment cases. This would mean that "[b]efore a prison official is allowed to lay his prohibitory hand on a religious group, a finding reviewable by the courts that the group presents a 'clear and present danger' to the orderly functioning of the prison should be required."[122] The special nature of prison does not prevent use of this Supreme Court test, although it is quite probably true that in a prison case it will be somewhat easier than in other contexts for a judge to conclude that a clear and present danger exists. Moreover, use of this test in a prison context would not be revolutionary, for a growing number of courts, including three federal circuits, have already recognized its applicability.[123] Use of such a test has been discussed with approval by legal commentators.[124]

In instances where cost or administrative burden is asserted as the excuse for not permitting a religious practice, such as in the minister or dietary cases, the first amendment impels the state to make an effort to permit the religious practice. In such cases the balancing test applied in *Barnett*

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119 State v. Cubbage, 210 A.2d 555, 562 (Super. Ct. Del. 1965) (from a speech by Rev. Donald Sheehy, O.P., L.L.B., Catholic Chaplain of the D. C. Dept. of Corrections).

120 Cooper v. Pate, 382 F.2d 518, 521 (7th Cir. 1967).

121 Dennis v. United States, 339 U.S. 162 (1950); Schenck v. United States, 249 U.S. 47 (1919).

122 Comment, *supra* note 75, at 1503.

123 Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Long v. Parker, 390 F.2d 816 (3d Cir. 1968); Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969); Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964).

124 Comment, *supra* note 75.

v. Rodgers[125] offers a reasonable solution: in order to restrict a religious practice the state must have a "compelling justificiation," and even then the prison authorities must explore ways to achieve these interests by "less stifling means" than those which totally restrict the religious practice.[126] The nonprison cases require no less;[127] and there appears to be no reason for making a distinction. The strong interests of the first amendment would be furthered, insuring conscientious efforts to provide inmates with rights that those outside prison enjoy, while not placing an impossible burden upon prison officials.

III. Inmate Legal Practice and Access to the Courts

A. *Access to the Courts*

In the past the courts have been least reluctant to interfere with prison administration when called upon to protect access to the courts themselves.[128] This principle was strongly asserted by the Supreme Court in *Ex Parte Hull*:[129]

> [T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.[130]

Although most cases in this area involve efforts by inmates to challenge their convictions, they also are responsible for a weakening of the noninterference and "hands-off" doctrines. Moreover, such cases also opened the door to vindication of other rights.[131] Since *Ex parte Hull* many cases have made it clear that "there can be no interference with an inmate's access to the courts;"[132] and that "regulations or restrictions that effectively preclude an inmate from communicating with courts cannot be tolerated."[133]

Thus, an inmate cannot be subjected to punishment for maintaining a lawsuit or for anything he alleges in a petition to the courts. In *Hymes*

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125 410 F.2d 995 (D.C. Cir. 1969).

126 *Id.*

127 *See* Dennis v. United States, 339 U.S. 162 (1950); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Schenck v. United States, 249 U.S. 47 (1919).

128 Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962) [hereinafter cited as Note].

129 312 U.S. 546 (1941).

130 *Id.* at 549.

131 *Supra* note 128, at 987-88. *See also* Jacob, *supra* note 53, at 273.

132 Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669, 673 (1966) [hereinafter cited as Barkin]. *See also* Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); United States *ex rel.* Foley v. Ragen, 52 F. Supp. 265 (N.D. Ill. 1943).

133 United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7, 12 (E.D. Pa. 1965).

v. Dickson[134] an inmate alleged that prison officials threatened him with disciplinary action if he did not dismiss a pending action. Although the complaint was mooted, the court said that if disciplinary action should result from statements taken from documents filed with the court, then the prison officials will have unreasonably interfered with access and the court will enjoin such action. Furthermore, in no way can complaints to the court be chilled through the disciplinary process: "imposition of punishment or threat of such punishment based upon a prisoner's statements or complaints to the court about prison conditions chills the prisoner's exercise of his First Amendment right to voice legitimate complaints, and thus would amount to a form of deterrent censorship."[135] Additionally, under the theory that access must be guaranteed, prison officials must not interfere with the lawyer-client relationship[136] or hinder access to a lawyer.[137] One court has enjoined inspection of incoming mail from attorneys for contraband unless done in the inmate's presence, because otherwise the threat of the communication being read would exert a chilling effect on the inmate's sixth amendment right to counsel.[138]

The principle of access to the courts has been expanded in recent years to encompass the provision of legal assistance to inmates in order to make the right of access more effective. Thus, in *Johnson v. Avery*[139] the Supreme Court held that as long as no adequate alternative was available prison officials could not forbid a jailhouse lawyer from rendering legal assistance to a fellow inmate in view of the fact that the latter needed such assistance to gain access to the courts.[140] Subsequently, a rule allowing jailhouse lawyers to help only illiterates was struck down, for inmates other than total illiterates also need assissance.[141] The rationale for this decision is that

> the most important part of a legal assistance plan is not the law books or library, or the availability of decisions, but the opportunity to consult with

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134 232 F. Supp. 796 (N.D. Cal. 1964).

135 Carothers v. Follette, 314 F. Supp. 1014, 1022 (S.D.N.Y. 1970). *See also* Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971), where the court held that censorship of the prisoner's petitions to the court violated the fifth amendment. In addition, the court found that Meola's transfer to the Departmental Segregation Unit was motivated chiefly by a desire to punish him for an attempted exercise of his right to access to the courts and held that this punishment was unconstitutional.

136 Rhem v. McGrath, 326 F. Supp. 681 (S.D.N.Y. 1971); Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970).

137 Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Brabson v. Wilkins, 19 N.Y.2d 433, 440, 227 N.E.2d 383, 386, 280 N.Y.S.2d 561, 565 (1967), (Keating, J., dissenting); *In re* Ferguson, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753 (1961).

138 Smith v. Robbins, 9 CR. L. REP. 2295 (D. Me. June 18, 1971), *aff'd*, 10 CR. L. REP. 2445 (1st Cir. Jan. 18, 1972).

139 393 U.S. 483 (1969).

140 *See also* Burnside v. Nebraska, 378 F.2d 915 (8th Cir. 1967); Jacob, *supra* note 53, at 267.

141 Wainwright v. Coonts, 409 F.2d 1337 (5th Cir. 1969).

> an attorney or at least a person of good common sense and experience who can, in a straightforward and complete manner, set forth the inmate's claim in understandable fashion.[142]

States have recently begun to provide various forms of legal assistance to inmates and courts are now beginning to rule on what, under *Johnson v. Avery*, constitute adequate alternatives to the assistance provided by jailhouse lawyers. For example, the Supreme Court of Arizona denied an inmate access to legal materials where the state prison had a law school post-conviction clinic and plaintiff had been represented by counsel in other litigation in which he had engaged while a prisoner.[143] By contrast, the Fifth Circuit held that Texas did not provide an adequate alternative by hiring only two lawyers and several law students to serve the needs of the entire inmate population of over 12,000.[144] Nevertheless, it seems well established that reasonable restrictions can be placed on the activities of jailhouse lawyers,[145] although arbitrary rules such as those forbidding one inmate from having another's legal papers cannot be upheld.[146]

B. *Provision of Legal Materials*

Recent litigation has developed the principle that equal protection and effective access to the courts require the provision of legal books and papers to inmates[147] because, "The right to have legal materials may be an essential corollary of the broader right to have access to the courts, since access is impeded if the prisoner lacks the opportunity to discover his rights."[148] On the other hand, courts have denied prisoners the right to possess an extensive law library within a cell and have held that a state need not provide a law library for inmates at a state mental hospital.[149] Nevertheless, in an action seeking to enjoin prison regulations which severely limited the times and places in which legal work could be done and severely restricted the acquisition and possession of legal material, an Oregon district court granted an injunction, agreeing with the inmate plaintiffs that the regulations denied them access to the courts.[150] Although the circuit court re-

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142 United States *ex rel.* Stevenson v. Mancusi, 325 F. Supp. 1028, 1032 (W.D.N.Y. 1971). In *Mancusi* the New York prison policy that prohibited an inmate from preparing legal papers for any inmate who tested over the 5th grade level of literacy was held invalid because no alternative means of legal assistance was available.

143 Foggy v. Eyman, 10 CR. L. REP. 2180 (Ariz. Sup. Ct. Nov. 2, 1971).

144 Novak v. Beto, 10 CR. L. REP. 2241 (5th Cir. Dec. 9, 1971).

145 Johnson v. Avery, 393 U.S. 483 (1969).

146 *In re* Harrell, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970).

147 United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7, 13 (E.D. Pa. 1965); Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961).

148 Jacob, *supra* note 53, at 263-64.

149 Robinson v. Birzgales, 311 F. Supp. 908 (W.D. Mich. 1970).

150 Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1969).

versed because it was "self-evident" that the inmates had reasonable access to the courts, it agreed with the basic reasoning of the lower court.[151]

A more definitive answer to questions about the scope of the state's duty to provide legal access and legal materials to indigent inmates was provided by the Supreme Court in *Younger v. Gilmore*.[152] In that case the defendant sued to enjoin enforcement of two prison rules: one established a list of legal materials permitted in California prison libraries[153] (the prison director had ordered all other law books in the inmate library destroyed); the other rule barred retention of papers of another inmate by jailhouse lawyers. The three-judge district court enjoined enforcement of the first rule and interpreted the second so that it would pertain only to storage of completed legal papers. The court noted that the regulation seriously infringed the prisoner's right to reasonable access and indicated that the case involved serious equal protection questions when affluent inmates could hire private counsel and purchase law books, while indigent inmates had to seek out help of fellow inmates or use the prison library. Thus, the district court concluded:

> "Access to the courts," then, is a larger concept than that put forward by the state. It encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him.[154]

On direct appeal the Supreme Court dealt with the case rather simply, saying, "Having heard the case on its merits, we find that this Court does have jurisdiction . . . and affirm the judgment of the District Court of the Northern District of California."[155]

C. *The Proper View of Access*

Anyone who adheres to the *Coffin v. Reichard*[156] theory of "retained rights" certainly cannot quarrel with a legal development which guarantees

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151 Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961).

152 404 U.S. 15 (1971).

153 The rule did not provide for annotated state codes, U.S. Reports, Federal Reports, California Reports, or the United States Code. There were only unannotated California codes and copies of some local court rules in the library.

154 Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970).

155 Younger v. Gilmore, 404 U.S. 15 (1971). *See also* Cruz v. Hauck, 404 U.S. 59 (1971), where the Supreme Court granted certiorari, vacated the judgment, and remanded the case for further consideration in light of *Younger v. Gilmore*. The *Cruz* case involved a § 1983 action brought by inmates of the Bexar County, Texas jail who claimed that authorities had denied them access to law books needed to seek their judicial remedies. Plaintiffs sought an injunction to restrain interference with reasonable access to hardbound lawbooks and other legal material. Officials answered the complaint by stating that maintenance of prison security necessitated removing hardback books as part of an overall scheme to arrest the smuggling of contraband. The district court summarily dismissed the complaint and the court of appeals refused to docket the cases without prepayment of filing fees and security. Mr. Justice Douglas, concurring, stated: "Whatever security measures may be needed respecting books, it is not conceivably plausible to maintain that essential books can be totally banned." 404 U.S. at 59, 60.

156 143 F.2d 443 (6th Cir. 1944).

the right of access to the courts. Any retained rights would be meaningless without access to a court for their vindication; and with the enormous number of successful cases involving inmate rights, it is certain that the asserted need for access to courts has a basis in fact. Since this is the right on which all others turn, it must be guaranteed, by the courts, unless vindication of the right is to be left to the discretion of prison officials, "which is tantamount to denying that such *rights* exist. . . ."[157] Such a position would be directly opposed to the *Coffin* view that rights are retained unless the state can justify their withdrawal as a necessary concomitant of incarceration.

The development of rules allowing law practice by jailhouse lawyers also seems desirable, for it is undeniable that such rules increase access to the courts by the indigent[158] and further the purposes behind the writ of habeas corpus.[159] Moreover, the reasons offered to justify curtailing law practice by jailhouse lawyers (but not to justify a reasonable regulation of their activities), namely, that their activities result in (1) extortion of fees, (2) fights, (3) development of inmate power structures, and (4) loss of inmate morale were shown in *White v. Blackwell*[160] to have a questionable basis in fact. Professor Jacob's account of that case illustrates that in fact morale and harmony in the Atlanta prison was improved by the work of jailhouse lawyers and that none of the prison officials could recall any occasion in which extortion, fights or a breach of discipline was caused by activities of jailhouse lawyers.[161] Although this is but one study, no others have appeared in which any of these undesirable practices have been documented.

Delineation of the better practice concerning the state's duty to provide legal materials as part of the right to access is more troublesome. Yet it seems clear that some minimum amount of material must be provided.[162] Access depends partially upon the prisoner's opportunity to discover his rights and the remedies available to him; therefore, access to legal materials would seem essential to adequate preparation and clear assertion of rights.[163] Consequently, the Legal Counsel to the Federal Bureau of Prisons concluded:

> Reasonable access to the courts logically includes permission for the inmate to acquire certain legal documents or books, and a reasonable opportunity for him to study and prepare materials. This is especially true where the inmate is not represented by counsel.[164]

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157 Note, *supra* note 128, at 987.

158 Wainwright v. Coonts, 409 F.2d 1337 (5th Cir. 1969).

159 Johnson v. Avery, 393 U.S. 483 (1969).

160 227 F. Supp. 211 (N.D. Ga. 1967); Jacob, *supra* note 53, at 267.

161 *Id.*

162 *See* Hymes v. Dickson, 232 F. Supp. 796 (N.D. Cal. 1964).

163 Note, *supra* note 58.

164 Barkin, *supra* note 132, at 678-79.

In this area administrative interests such as cost of materials, space available and generally smooth operation of the institution are considerations weighing against granting every inmate request for legal materials. Since these appear to be legitimate state interests, the test of what materials should be provided to inmates must be "one of balancing"[165] the state interests against the right of an inmate to have effective access to the courts,[166] a test which is perhaps implicit in both *Price* and *Coffin*. Although reasonable discretion by officials might be appropriate as to the number and kinds of legal materials provided and the time available to use them; nevertheless, courts should not fail to scrutinize denials to provide legal materials, so that inmates can be assured of retaining effective access to the courts. Consequently,

> [t]here appears to be no justification for limiting the constitutional right of prisoner access to the courts to the presentation of facts rather than legal propositions. If the transmission of legal arguments is included, how can the right be meaningful unless the courts assure prisoners reasonable access to law books and legal materials?
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> . . . .
>
> Moreover, although it is not unlikely that many particular regulations could be sustained as reasonable restrictions on the rights of prisoners, it seems clear that prisoner access to the courts becomes meaningful only when access to legal materials is protected and that this protection, in turn, takes on substance only when the courts are willing to look into the specifics of the situation. . . ."[167]

IV. MEDICAL CARE

Medical treatment and the right to receive it are obviously important to an inmate.

> Medical personnel, for example, are important. Inmates frequently are in acute need of dental care and have a variety of physical problems which long have been neglected. A physical examination is prerequisite to classification decisions regarding an inmate, and it often reveals defects requiring corrective treatment. Research has suggested that a reduction of recidivism is associated not only with medical services for the standard types of handicap but also in some cases with plastic surgery to correct defects of appearance.[168]

A number of cases indicate that inmates do not always receive the medical treatment they need. Moreover, in reply to a questionnaire, nearly

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[165] Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970).

[166] Johnson v. Avery, 393 U.S. 483 (1969). The Court observed that a state could provide a reasonable alternative to jailhouse lawyers. If any court ever recognizes that inmate lawyers do not provide adequate assistance to indigent inmates, then equal protection and a right to effective access might require the state to provide legal assistance to inmates, either in the form of law students or perhaps public defenders. After all, indigents have access to legal aid before incarceration. Therefore, what is implicit in their sentence which causes them to lose such access?

[167] Note, *supra* note 128, at 993, 995.

[168] TASK FORCE REPORT, *supra* note 11, at 51.

two-thirds of Iowa state prison inmates said they would prefer a private physician at their own expense over the care they were then receiving.[169] Nevertheless, most cases have sustained the denial of medical treatment.

Recently courts have begun to examine inmate allegations of the denial of medical care[170] more closely, so the law in this area is evolving. In the past courts invoked the "exceptional circumstances" doctrine and granted relief only for extremely serious deprivations of medical care, usually in a damage suit after the injury had been suffered. Now, however, with the greater willingness of the courts to review correctional judgments, there is a move to expand this right to include all necessary and "reasonable" medical treatment.

A. *Early Law*

In most early cases prisoners met with little success in alleging a denial of necessary medical treatment. Relief usually was denied on the ground that such a deprivation was not so gross as to amount to a cruel and unusual punishment.[171] In other instances relief was denied because the court would not involve itself in the administration of prison discipline.[172] For example, in *Redding v. Pate*,[173] an epileptic prisoner claimed that he suffered intense headaches, that he had been accused of faking, and that although he had been given some medication, he had not received any real treatment. The court held that the complaint did not state a claim for deprivation of "essential" medical care and relief was denied. In *Cullum v. California Department of Corrections*,[174] a prisoner brought a suit under 42 U.S.C. § 1983 alleging that he had been assaulted and seriously injured by a prison guard and was given inadequate medical attention for his injuries. Relief was denied because the plaintiff "failed to establish that [his] treatment was so inadequate as to constitute a violation of his constitutional rights."[175] The court noted, however, that in an exceptional circumstance a deprivation of essential medical care might constitute such a violation.

On the other hand, courts were always willing to intervene in "excep-

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169 Note, *supra* note 58, at 687. This seems especially surprising since most inmates are indigent.

170 Barkin, *supra* note 132, at 673.

171 *See* Snow v. Roche, 143 F.2d 718 (9th Cir. 1944); Sarshik v. Sanford, 142 F.2d 676 (5th Cir. 1944); Feyerchak v. Hiatt, 7 F.R.D. 726 (M.D. Pa. 1948); Commonwealth *ex rel.* Rogers v. Cloudy, 170 Pa. Super. 639, 90 A.2d 382 (1952); State *ex rel.* Baldwin v. Warden of Maryland Penitentiary, 192 Md. 712, 63 A.2d 323 (1949); Jacobs v. Warden, 190 Md. 755, 59 A.2d 753 (1948).

172 Cullum v. Cal. Dept. of Corrections, 267 F. Supp. 524 (N.D. Cal. 1967).

173 220 F. Supp. 124 (N.D. Ill. 1963).

174 267 F. Supp. 524 (N.D. Cal. 1967).

175 *Id.* at 525. For a similar denial of relief where an inmate requested dental care to save his teeth, see Schack v. Florida, 391 F.2d 593 (5th Cir. 1968).

tional circumstances." Thus, in *McCollum v. Mayfield*[176] an inmate, who had become permanently paralyzed as a result of an injury sustained while working in prison and who alleged that he was denied care which could have prevented the paralysis, was held to have stated a cause for action. Another case held that an inmate stated a claim for relief when he became deaf from an alleged beating by prison guards and was subsequently denied medical care.[177] Other exceptional circumstances involved the denial of medical care for an infected leg that was later amputated[178] and the denial of recommended surgery on an inmate's jaw.[179]

B. *The Right to Reasonable Medical Treatment*

Since 1965 a number of courts have begun to recognize a right to reasonable medical treatment, perhaps adopting the view that "[t]he obligation of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty."[180] Thus, a federal district court granted injunctive relief for two inmates who were in poor physical condition, relieving them from the necessity of performing heavy physical labor. In response to a contention that the inmates had been refused needed medical treatment the court held that the prison was required to furnish reasonable medical attention for injuries and disabilities and to permit sick call at all reasonable times.[181] A year later, the Fourth Circuit granted relief to an inmate with a heart condition who had been taken off a medically prescribed diet and assigned heavy labor, stating that "[p]risoners are entitled to medical care . . . . Where there is no provision for administrative review of claims of unreasonable deprivations of such rights, those claims are certainly justiciable."[182] In the more recent case of *Tolbert v. Eyman*,[183] a diabetic prisoner claimed that he was

[176] 130 F. Supp. 112 (N.D. Cal. 1955).

[177] Gordon v. Garrison, 77 F. Supp. 477 (E.D. Ill. 1948).

[178] Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957).

[179] Hirons v. Director, Patuxent Institution, 351 F.2d 613 (4th Cir. 1965).

[180] Johnson v. Dye, 175 F.2d 250, 256 (3d Cir. 1949).

[181] Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965). Federal courts are just beginning to delineate what the provision of "reasonable medical treatment" entails. The Third Circuit in Nettles v. Rundle, 10 CR. L. REP. 2221 (3d Cir. Dec. 8, 1971) held that no § 1983 cause of action was stated by an allegation that authorities were negligent in providing medical treatment. Instead, the court said this was merely an allegation of a tort under state law. Similarly, the Tenth Circuit in Paniagua v. Moseley, 451 F.2d 228 (10th Cir. 1971) held that there was no constitutional or § 1983 claim stated where there was only a difference of opinion as to the proper treatment provided. The inmate sought mandamus to compel the warden to see that he received surgery after the prison doctor treating the plaintiff decided that surgery was not called for. In denying relief, the court noted particularly that this was not a case of a prisoner being refused treatment. These cases might be taken to imply that although medical treatment of some kind must be provided, federal courts will be reluctant to scrutinize the type of medical attention furnished. *But see* Sawyer v. Sigler, 320 F. Supp. 690 (D. Neb. 1970).

[182] Edwards v. Duncan, 355 F.2d 993, 994-95 (4th Cir. 1966).

[183] 434 F.2d 625 (9th Cir. 1970). For another very recent case, see Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970) in which a state prisoner suffering from infantile paralysis alleged

denied the medicine that physicians told him he could have, even after his wife attempted to send it. The court stated that "[t]hese allegations state a perfectly viable claim . . . . [O]n the record before us, the potential for strong factual dispute is apparent."[184] Finally, at least one court has forcefully spoken of an inmate's right to medical treatment in constitutional terms. In *Sawyer v. Sigler*,[185] a physician recommended that one of the plantiffs, who was possibly suffering from dangerous tumors, receive outside treatment, which was denied. The court ordered the warden to provide it and stated:

> If the treatment or lack of treatment of a prisoner is such that it amounts to indifference or intentional mistreatment, it violates the prisoner's constitutional guarantees. When a state undertakes to imprison a person, thereby depriving him largely of his ability to seek and find medical treatment, it is incumbent upon the state to furnish at least a minimal amount of medical care for whatever conditions plague the prisoner.[186]

Although courts are expanding the inmate's right to receive medical care, none seems to have examined the considerations involved. First, it seems that an inmate who receives reasonable medical treatment is a better prospect for rehabilitation than one who does not. Second, since prison rules normally do not permit an inmate to hire a private physician, imprisonment deprives a prisoner of the opportunity that he would have to seek treatment for himself if he were not incarcerated. But what correctional interest is served if the state denies the inmate proper medical treatment? The only legitimate reason for such a denial of necessary care is that it would save the state the costs of providing treatment. But it has never been asserted that reasonable care is prohibitively costly. Indeed, it has been argued that treatment should be provided regardless of cost:

> A state which deprives an individual of his freedom must assume an obligation to provide those necessities consistent with decency and humanity. Providing adequate medical facilities and competent physicians is one such obligation. . . . What is "adequate" medical care within the prison seems to be the provision of opportunities and facilities similar to those available on the outside.[187]

This view seems proper, for no purpose is served by removing the burden from the state to provide this treatment, for after all, imprisonment is intended to deprive one of his liberty but not of his life.

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that he had been deliberately removed prematurely from a hospital following an operation, without a hospital discharge and in disregard of medical advice, and then prematurely returned to the prison population. The court held that a cause of action was stated under 42 U.S.C. § 1983.

184 Tolbert v. Eyman, 434 F.2d 625, 626 (9th Cir. 1970). *See also* United States *ex rel.* Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970); Willis v. White, 310 F. Supp. 205 (E.D. La. 1970).

185 320 F. Supp. 690 (D. Neb. 1970).

186 *Id.*

187 Note, *supra* note 58, at 687.

An issue not yet faced by the courts is whether or not "reasonable care" encompasses preventive medical treatment such as checkups, vaccines, and chest x-rays. Provision of such care would seem to be both wise practice by officials and a part of reasonable medical care (for the same reasons that the *Task Force Report* suggests remedial treatment is valuable) because inmates themselves cannot privately secure such care. Moreover, the notion of incarceration contains nothing which suggests that when one becomes a prisoner he is no longer to benefit from modern medical practices, many of which are preventative.

Even though there is no compelling interest to justify the denial of medical care, it need not be provided whenever or in whatever manner desired. *Tally*[188] called for reasonable care at all reasonable times, and this seems to be the proper view in that it gives some discretion to administrators. This approach enables officials to deal with chronic "complainers," *i.e.*, inmates who wish only to avoid work and who consistently appear at sickcall, and to regulate reasonably the time and place of any treatment. Reasonable regulations are necessary because quite often "[v]ery minor injuries or illnesses can become of great concern to the individual who has much time to brood about them."[189] Nevertheless, under the *Coffin* approach there is no reason why courts should not scrutinize prisoner complaints in this area to assure that prisoners are not being unreasonably denied medical treatment and to see whether administrators are abusing their discretion.

V. Racial Discrimination

This is another area of internal prison law which has changed rapidly from one in which courts would seldom intervene to prohibit racial discrimination to one in which administrators have a heavy burden to justify any practices which fall unequally on the races. Such a change undoubtedly reflects the general movement throughout American law to prohibit racial discrimination.

A. *Past History*

In *Nichols v. McGee*,[190] a Folsom inmate alleged that he was subject to systematic segregation, discrimination and degradation because of race

[188] Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965). In the same case the court held that requiring the plaintiff to take medicine in crushed form (for "security reasons"), which caused nausea, was cruel and unusual punishment and a denial of medical treatment as required by the eighth and fourteenth amendments. (The medicine was readily available in forms which would not cause nausea). Moreover, three inmates of the same institution had been declared medically unfit to work and, therefore, had been denied good time credit by the warden. (There was a statutory right to good time for working inmates.) The court held that this denial of good time credit violated the fourteenth amendment because it exerted a chilling effect on the inmates' constitutional rights to medical treatment.

[189] Note, *supra* note 58, at 687.

[190] 169 F. Supp. 721 (N.D. Cal. 1959), *appeal dismissed*, 361 U.S. 6 (1959).

because he was forced to stand in all-Negro line and tally formations, live in an all-Negro cellblock, and eat in an all-Negro dining area. The court denied relief, asserting that there had been a failure to show that petitioner's rights could not be preserved in the state courts but concluded that "[e]ven if recourse had first been had to the courts of California, plaintiff's proposed complaint could state no cause of action in this Court."[191] The Supreme Court dismissed the appeal from this order of the three-judge court.[192] An earlier example of this "hands-off" attitude toward complaints of racial discrimination was expressed in *United States ex rel. Morris v. Radio Station WENR*,[193] a case in which the petitioner alleged that the prison authorities discriminated by denying Negroes the opportunity to audition or act as announcers for a radio program that had been established. The court found it "clearly evident" that the complaint was without merit and refused even to consider the truth of the allegations of discrimination.[194] The development of these cases led a commentator in 1968 to remark that "[r]acial discrimination in the prisons enjoys a surprising and tenuous immunity from judicial intervention."[195] Nevertheless, recently the law seems to have developed to such an extent that that statement is no longer valid.

B. *The New Development*

A state can no longer maintain a system of segregated jails, prisons or institutions for juvenile delinquents. Many cases now hold this, and no cases have been found wherein the opposite has been sanctioned. In *Washington v. Lee*,[196] a three-judge court held that state statutes requiring segregation of races in Alabama prisons and jails violated the fourteenth amendment. In *Short v. Cavedo*,[197] the court ordered desegregation of all local jails in Virginia. *Board of Managers of Arkansas Training School v. George*[198] and *Montgomery v. Oakley Training School*[199] led to the desegregation of two separate juvenile training schools in both Arkansas and Mississippi respectively.[200] Consequently, it appears that no state can constitutionally maintain totally segregated correctional facilities.

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191 169 F. Supp. 721, 724 (1959).

192 361 U.S. 6 (1959).

193 209 F.2d 105 (7th Cir. 1953).

194 *Id.* at 107. *See also* Toles v. Katzenbach, 385 F.2d 107 (9th Cir. 1967), *vacated*, 392 U.S. (1968), where the Supreme Court dismissed as moot a court of appeals decision upholding an administrative decision to allow inmates in cells to acquiesce or to reject a new assignee, even though racial discrimination was the result.

195 Note, *supra* note 58, at 685.

196 263 F. Supp. 327 (M.D. Ala. 1966).

197 6 CR. L. REP. 2080 (E.D. Va. Oct. 17, 1969).

198 377 F.2d 228 (8th Cir. 1967).

199 426 F.2d 269 (5th Cir. 1970).

200 For a similar holding concerning Alabama Reform Schools, see Crum v. State Training School for Girls, 413 F.2d 1348 (5th Cir. 1969).

The protection of the individual's right to be free from racial discrimination has undergone development beginning as early as 1963. In *Dixon v. Duncan*,[201] a court enjoined the threatened integration of a federal prison dormitory because the proposed plan would have constituted discrimination on the basis of color. The plan would have given black inmates a choice between integrated or all-black dormitories but would have forced all the white inmates to integrate or suffer punishment.[202] In *Rivers v. Royster*,[203] an inmate complained that he was not permitted to receive a Negro newspaper because he was a Negro, while white inmates were permitted to receive white-oriented newspapers. The court held that the inmate had been denied equal protection since he was denied a right as a Negro which was granted to white prisoners and said, "the prison superintendent may not resort to acts of racial discrimination in the administration of the prison."[204] In addition, there are many recent cases in which courts have considered themselves competent to scrutinize complaints of racial discrimination, even though the complaints were ultimately rejected as not proven.[205] One recent and very important case that found racial discrimination is *Jackson v. Godwin*[206] in which a black inmate charged that prison officials denied him the right to receive Negro newspapers and magazines while permitting white inmates to receive white newspapers and magazines. The prison magazine selection committee had sought

> "[U]plifting," "entertaining and educational" magazines and [by regulation] prohibited publications which would "incite and stimulate in an unhealthy manner" because of "sexy or spicy" material or which contained articles concerning racial unrest or violence which would aggravate racial tensions and disciplinary problems in the prison.[207]

In reply to this contention the court said:

> It is . . . clear that the prison officials have not met the heavy burden of justifying either the resulting racial discrimination or the resulting curtailment of petitioner's First Amendment freedoms and denial of the equal enjoyment of rights and privileges afforded other, and white, prisoners.[208]

Later in the opinion the court observed:

> Normally the discretion allowed the judgment of state officials is wide and courts will not interfere absent a finding that the governmental action is

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201 218 F. Supp. 157 (E.D. Va. 1963).

202 *See also* Bolden v. Pegelow, 329 F.2d 95 (4th Cir. 1964), where an injunction was issued prohibiting racially segregated prison barber shops.

203 360 F.2d 592 (4th Cir. 1966).

204 *Id.* at 594.

205 Coleman v. Peyton, 362 F.2d 905 (4th Cir. 1966); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970).

206 400 F.2d 529 (5th Cir. 1968).

207 *Id.* at 535.

208 *Id.*

> arbitrary or unreasonable, but where racial classifications are involved, the Equal Protection and Due Process Clauses . . . command a more stringent standard.[209]

Consequently, with the demise of the "hands-off" and "abstention" doctrines in this area of law, inmates can expect to have their claims of racial discrimination adjudicated more readily than before. Moreover, if such claims are proven, it will take strong justifications by prison officials to support racial discrimination.

C. *The Preferred View*

It certainly is correct to require desegregation of penal systems and facilities. Because of the strong constitutional command against racial discrimination through state action, courts like the one in *Washington v. Lee*[210] could conceive of no consideration of prison security or discipline which would sustain the constitutionality of state statutes which on their face require complete and permanent segregation.[211] No cases have ever asserted any legitimate justification for institutional segregation, and all the cases indicate that the reason for the segregation has been racial discrimination.

However, for individual complaints within a prison there could be situations in which a rule that resulted in racial discrimination pursuant to a legitimate prison interest, such as prevention of a breach of security or to avoid an inflammatory situation, would be constitutional. Thus, in a situation such as *Dixon v. Duncan*,[212] where a dormitory was to be integrated against the wishes of a minority, an explosive situation could have developed. Counterbalancing this, however, are the interests recognized by *Brown v. Board of Education*,[213] which apply in a prison context: "Insofar as socio-psychological insights support *Brown*, they are clearly not limited to the facts of that case, and the demands of the equal protection clause have been extended beyond the area of education."[214] In most circumstances the strong commands of *Brown* should override prison interests, particularly since *Cooper v. Aaron*[215] indicates that even the danger of violence and turmoil that might occasionally justify partial segregation must

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[209] *Id.* at 537. A recent case which can possibly be explained by the same rationale is *Owens v. Brierly*, 10 CR. L. REP. 2203 (3d Cir. Nov. 17, 1971). The plaintiff was refused permission to subscribe to *Sepia*, a "black" publication, which was not included among the prison's approved list of 125 publications (only two of the 125 were "black" publications). The court of appeals held that the district court was wrong in summarily dismissing the claim as frivolous and held that there must be a responsive pleading. The court stated that it did not even know why the magazine was excluded.

[210] 263 F. Supp. 327 (M.D. Ala. 1966).

[211] Jackson v. Godwin, 400 F.2d 529, 534 (5th Cir. 1968).

[212] 218 F. Supp. 157 (E.D. Va. 1963).

[213] 347 U.S. 483 (1954).

[214] Note, *supra* note 58, at 1003 n.103.

[215] 358 U.S. 1 (1958).

be limited to extreme cases. Therefore, the mere possibility of violence should be insufficient to justify segregation. One commentator agrees in large measure with this reasoning:

> Although the problem of prison discipline does pose issues different from those raised in the school situation, *Brown v. Board of Education* indicates that discrimination on the basis of race is detrimental to the mental health and to the quality of education of Negro school children. These problems are relevant to penal theory oriented towards rehabilitation of the convicted felon, who must be educated to accept his role in an integrated society. The only countervailing consideration advanced for allowing racial segregation of prisoners is that it will avoid the possibility of violence between inmates. However, the segregation itself may be a cause of violence within a prison, and even if it is not, the mere possibility of violence has been held to be an insufficent reason to justify segregation in other areas. Even though the issue of segregation is not within the first amendment, . . . it seems that such practices should be required to be justified by a showing of pressing public necessity.[216]

A very recent case is fully in accord with this view. In *McClelland v. Sigler*[217] the district court ordered an end to the segregated housing of state prison inmates, which had resulted in a preponderance of whites enjoying more comfortable quarters than all blacks and some Indians and Mexicans. The warden's argument that placing blacks in the more comfortable complex with whites would result in serious racial strife was held insufficient to overcome the denial of equal protection resulting from this segregation. The court emphasized, "[T]he demands of equal protection permeate the penal system, as well as other governmentally operated institutions."[218]

This analysis, then, moves beyond a strict *Coffin* test, which would require prison officials to show a rational and legitimate reason for any practice that segregates inmates, such as a substantial danger of disruption. But if officials can demonstrate in fact that a riot is imminent, they have probably offered a "compelling" reason. Thus, in some circumstances the test for determining prisoners' rights to racial equality goes beyond *Coffin* and becomes one of balancing the equal protection values of the Constitution against the state's legitimate interest in preventing prison violence.

VI. Mail Rights

A. *Restrictions on Inmate Mail*

Prison officials generally regard the opportunity to send and receive mail as a privilege conditioned upon an inmate's authorization of censorship of

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[216] Note, *supra* note 58, at 686-87.

[217] 327 F. Supp. 829 (D. Neb. 1971).

[218] *Id.* at 831.

any letters.[219] In most cases inmate correspondence is limited to persons on an inmate's approved correspondence list.[220]

> Your officer will supply you with a form on which you should list names and addresses of all those with whom you intend to correspond. . . . You may not thereafter correspond with anybody whose name is not on the list, unless you have received prior permission . . . . If it becomes evident at any time that correspondence does not meet approved standards names may be deleted from the correspondence list . . . . In-coming and out-going mail is censored in accordance with the authorization form which you have signed. Therefore, you should not seal your letters. . . .[221]

In addition to censorship, many other restrictions are placed upon correspondence:

> The frequency with which letters may be written varies greatly from institution to institution. In some, the prisoner is permitted to write only one letter per week; in others, two or three. . . .
>
> Penal institutions strictly control the contents of outgoing mail. Letters generally must be written in the English language and must refer to "family and personal matters only."[222]

Until very recently the courts uniformly[223] upheld this regulation and censorship of mail, usually without any discussion of the reasons for its justification. For example, in *McCloskey v. Maryland*[224] an inmate sought a court order requiring officials to permit him to engage in extensive and uncensored correspondence, but the court denied relief on the general ground that prison officials must have a wide discretion because they are responsible for the security of the institution.

> While an inmate of such an institution should be allowed a reasonable and proper correspondence with members of his immediate family and, at times, with others, it is subject to censorship to be certain of its reasonableness and propriety. A broader correspondence is subject to substantial limitations or to absolute prohibition. Control of the mail to and from inmates is an essential adjunct of prison administration and the maintenance of order within the prison.[225]

Stated more bluntly, a suit by a prisoner seeking damages and the protection of his rights "to the security of an inviolate character of his letters

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219 Palmigiano v. Travisono, 317 F. Supp. 776, 777 (D.R.I. 1970); Jacob, *supra* note 53, at 237; HARVARD PRISON LEGAL ASSISTANCE PROJECT TRAINING MANUAL, at 67.

220 Jacob, *supra* note 53, at 238 nn.52 & 53.

221 INMATE RULES AND REGULATIONS, M.C.I., WALPOLE, MASSACHUSETTS, from the HARVARD PRISON LEGAL ASSISTANCE PROJECT TRAINING MANUAL, at 67-68. For a survey of more such rules, see Jacob, *supra* note 53, at 237-40.

222 Jacob, *supra* note 53, at 239. *See also* Palmigiano v. Travisono, 317 F. Supp 776 (D.R.I. 1970), where Judge Pettine surveys the rules and restrictions that existed at the A.C.I., Cranston, R.I.

223 Within the past two years, a number of cases have begun to reject prison officials' absolute discretion in censorship.

224 337 F.2d 72 (4th Cir. 1964).

225 *Id.* at 74.

and packages while in transit in the United States Mails"[226] is properly dismissed because "[i]t is well recognized that prison authorities have the right of censorship of prisoners' mail."[227] Until last year one could say that the law permitted censorship of the prisoner's mail, limitation of the number and type of people with whom he could correspond, and restriction of the types of correspondence in which he could engage.[228]

1. Mail to the Courts

Notwithstanding earlier law, the cases now grant inmates a nearly absolute right to uncensored correspondence with the courts on legal matters and are beginning to extend this concept to written communication with public officials and attorneys.[229] The Supreme Court considered mail to the courts in *Ex parte Hull*,[230] a case in which prison officials pursuant to an institutional rule refused to mail a writ which the inmate had prepared for filing in the Supreme Court. The Court held that the prison regulation was invalid, stating that officials may not abridge an inmate's right to apply to a federal court.

> Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.[231]

This concept has been expanded beyond habeas corpus and now includes access to the courts "for the presentation of alleged legal wrongs."[232]

At first, censorship of materials sent to the courts was merely frowned upon. One case held that the receipt and delivery of mail to the courts should be "[d]elayed no longer than the necessities of sorting require. Further delay for other purposes, such as censorship, seems both inappropriate and unnecessary."[233] Recent cases, however, have made it clear that mail to the courts may not be censored.[234] The fact that prisoners may exaggerate about prison conditions and make false allegations against pris-

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[226] Adams v. Ellis, 197 F.2d 483, 484 (5th Cir. 1952).

[227] *Id.* at 485. *See also* Numer v. Miller, 165 F.2d 986 (9th Cir. 1948); Sinclair v. Henderson, 331 F. Supp. 1123 (E.D. La. 1971).

[228] *See, e.g.*, Diehl v. Wainwright, 419 F.2d 1309 (5th Cir. 1970) (the court did not even closely scrutinize a refusal to allow an inmate to take a Bible correspondence course); Stroud v. Swope, 187 F.2d 850 (9th Cir. 1951) (a regulation was upheld which prevented business correspondence).

[229] *See* Section III of this article on Legal Access to the Courts beginning at note 128 *supra.*

[230] 312 U.S. 546 (1941).

[231] *Id.* at 549.

[232] Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965).

[233] Coleman v. Peyton, 362 F.2d 905, 907 (4th Cir. 1966).

[234] *See* Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970).

on officials cannot justify prison review and censorship of the contents of an inmate's correspondence with the courts.[235]

2. Mail to Attorneys

Many cases stand for the proposition that although mail must be sent to an inmate's attorney it nevertheless can be censored.[236] The rationale of these cases seems to be that (1) refusal to mail such letters impedes access to the courts which hinders an absolute right which the law secures to a prisoner[237] and (2) general security and discipline considerations justify censorship. For example, *Bailleaux v. Holmes*[238] held that letters to attorneys could be censored but only if they were not unnecessarily delayed. In *Cox v. Crouse*[239] an inmate complained that letters to his attorney were read and communicated to the Kansas Attorney General. On appeal the circuit court upheld the trial judge's finding that "this action . . . was highly improper, but this court cannot infer that any prejudice arose to petitioner from it."[240]

Nevertheless, the law seems to be slowly moving in the direction of prohibiting censorship of communication with attorneys. This development apparently began with the dissent of Judge Keating in the 4-3 decision of *Brabson v. Wilkins*[241] in which he reasoned:

> I believe that these limitations (restricting correspondence to an attorney to matters regarding the legality of his detention and the nature of treatment received, plus the right to censor all communications and excise therefrom matters unrelated to permissible subject matter) as well as the the authority given the Warden unnecessarily interfere with and endanger this prisoner's right to communicate with his attorney. . . .
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> . . . .
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> Judges and courts are not the only persons or agencies capable of granting relief to prisoners complaining about the illegality of their . . . detention. For this reason, I see no basis for distinguishing between letters to courts, to the prisoner's attorney or to government officials.[242]

In *Sostre v. Rockefeller*[243] District Judge Motley adopted Judge Keating's

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[235] Carothers v. Follette, 314 F. Supp. 1014, 1022 (S.D.N.Y. 1970).

[236] *See also* Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970) (letters to the A.C.L.U. must be mailed); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965) (letters to attorneys concerning nonconfidential matters can be censored); Sutton v. Settle, 302 F.2d 286 (2d Cir. 1962) (mail to attorneys can be censored); *accord*, Burns v. Swenson, 300 F. Supp. 759, 761 (W.D. Mo. 1969): "[R]estrictions will not be allowed to operate to deny a prisoner access to the federal courts for the presentation of alleged legal wrongs."

[237] Burns v. Swenson, 300 F. Supp. 759 (W.D. Mo. 1969).

[238] 177 F. Supp. 361, (D. Ore. 1959), *rev'd on other grounds*, 290 F.2d 632 (9th Cir. 1961).

[239] 376 F.2d 824 (10th Cir. 1967).

[240] *Id.* at 826.

[241] 19 N.Y.2d 433, 227 N.E.2d 383, 280 N.Y.S.2d 561 (1967).

[242] *Id.* at 438, 227 N.E.2d at 385, 280 N.Y.S.2d at 564.

[243] 312 F. Supp. 863 (S.D.N.Y. 1970).

opinion as her own with respect to a complaint against the warden's censorship of mail to plaintiff's attorney. This ruling was upheld on appeal and the circuit court also stated that when an inmate seeks to secure redress of alleged abuses, the authorities cannot delete materials from correspondence or withhold or refuse to mail a communication between him and his attorney.[244] In another recent case, *Palmigiano v. Travisono*,[245] District Judge Pettine also agreed with Judge Keating and found that "contact with an attorney, and the right to consult privately, is vital to an inmate's access to the Courts."[246] Consequently, he ordered that defendants "shall not open or otherwise inspect the contents of any incoming or outgoing letters between inmates and . . . [their attorneys]."[247] During the past year a number of cases have adhered to this position,[248] and one court has even upheld the right to send letters concerning prison matters to the news media.[249]

B. *Developing Concepts*

Since mid-1970, three courts have strongly rejected the old law, held various forms of mail censorship unconstitutional, and delineated the permissible limits of censorship. The landmark case was *Palmigiano v. Travisono*,[250] an action brought by six inmates awaiting trial at Rhode Island's Adult Correctional Institution at Cranston. The court did not limit its temporary restraining order to the unconvicted detainees,[251] but ordered an end to the reading and censorship of all incoming and outgoing mail, including that of courts, government officials, and attorneys. The court found that "total censorship serves no rational deterrent, rehabilitative or prison security purposes . . . ."[252] It stated that the indiscriminate "opening and reading of all prisoner mail . . . is a violation of the Fourth Amend-

244 Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).

245 317 F. Supp. 776 (D.R.I. 1970).

246 *Id.* at 789.

247 *Id.* at 788-89.

248 Smith v. Robbins, 328 F. Supp. 162 (D. Me. 1971), *aff'd*, 10 CR. L. REP. 2445 (1st Cir. Jan. 18, 1972) a partial consent decree prohibited outgoing mail to attorneys, courts, or to officials from being opened and permitted incoming mail from attorneys and courts to be opened for contraband inspection, and then only in the inmate's presence; Marsh v. Moore, 325 F. Supp. 392 (D. Mass. 1971), granted injunctive relief against censorship of correspondence with plaintiff's attorney, but permitted officials to examine the letters with a fluoroscope or metal detecting device or to manipulate the envelopes manually; People v. Wainwright, 325 F. Supp. 402 (M.D. Fla. 1971), ordered an end to censorship of prisoner's mail to and from local lawyers.

249 Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971). The court applied the clear and present danger test and found no legitimate state interest supporting the denial of the inmate's first amendment right to correspond with the news media. The court both noted that it was unreasonable to argue that such correspondence would be a means of facilitating escapes and said that "the prisoner's right to speak is enhanced by the right of the public to hear."

250 317 F. Supp. 776 (D.R.I. 1970).

251 The court granted plaintiffs' motion to convene a three-judge court and granted the temporary restraining order on the mail censorship issues.

252 317 F. Supp. at 785.

ment."[253] Moreover, "[C]ensorship for such reason [to control criticism of the institution] is an unconstitutional infringement of the First Amendment rights . . . including the right to petition for redress of grievances."[254] In summary, *Palmigiano v. Travisono* held:

(1) The officials shall not open or otherwise inspect incoming or outgoing letters to various public officials, courts, the inmates' attorneys, or any licensed Rhode Island attorneys.

(2) All incoming letters (other than in 1 above) may be opened and inspected for drugs, weapons, and contraband.

(3) Incoming letters may be read and censored for inflammatory writings and pornography except for letters from persons on the inmates' approved addressee list, which may be inspected as in 2 above, but not read.

(4) In censoring for pornography, officials must use the test of the U.S. Supreme Court as enunciated in *Roth v. U.S.*[255]

(5) Reading of any outgoing mail is unnecessary and violates first amendment rights of the parties involved unless done pursuant to a search warrant. Without a search warrant, outgoing mail may not be opened, read, or inspected.

The second case since mid-1970 to consider prisoners' mail rights was *Jones v. Wittenberg*,[256] in which the court ordered that for inmates awaiting trial:

(1) There shall be no censorship of outgoing mail.

(2) There shall be no limitation on the persons to whom outgoing mail may be directed.

(3) There shall be no censorship of incoming letters from the prisoner's attorney or from any judge or elected public official.

(4) Incoming parcels for letters may be inspected for contraband, but letters may not be read.

(5) Proper arrangements shall be made to insure that prisoners may freely obtain writing materials and postage.

(6) Indigent prisoners shall be furnished at public expense writing materials and ordinary postage for their personal use in dispatching a maximum of five letters per week.

For prisoners under sentence, however, the court held that standards numbers (2) and (4) need not be applied and that reasonable limitations could be placed on the number of letters sent.

Finally, *McCray v. State*[257] found that censorship of outgoing mail serves no proper state interest and permitted officials to censor incoming mail only by reading it or searching for contraband. Moreover, when

[253] *Id.* at 791.

[254] *Id.* at 788.

[255] 354 U.S. 476 (1957).

[256] 330 F. Supp. 707 (N.D. Ohio 1971).

[257] 40 U.S.L.W. 2307 (Cir. Ct. App. Md. Nov. 11, 1971).

mail is to be censored, notice must be given and the inmate must be given an opportunity to reply.[258]

These decisions are certainly harbingers of the future and prison administrators would be wise to modify censorship rules in order to save themselves time and effort, for this area of law will undoubtedly generate a great quantity of litigation in the near future. Fewer and fewer courts can be expected to approve of unbridled censorship powers in the hands of prison officials.

C. *Considerations Against Restrictions*

In the area of correspondence as in any other, "[t]he tension is evident; a prisoner can be viewed as a citizen whose rights will be limited only to the extent absolutely necessary for the maintenance of the status of incarceration [*Coffin*], or he can be viewed as a 'quasi-slave' whose rights are fully removed . . . [*Price*]."[259] It is important to remember that written communication is within the area of preferred first amendment freedoms and thus a heavy burden must be placed on officials to justify restrictions on written communication.

> Both oral and written communications are included within the First Amendment guarantee of freedom of speech. The free speech clause of the First Amendment is broad enough to comprehend the right to correspond with others. In addition, correspondence sent to public officials to protect injustices or seek to redress alleged grievances is protected under the clause of the First Amendment which guarantees the right to petition for redress of grievances.[260]

That the right to communicate by mail should not be withheld is further justified by the fact that many of the values of freedom of expression are present inside the prison just as in the general population: individual fulfillment, the need for information and the attainment of truth, and the indication of attitudes and problems of the inmates.[261] Since censorship regulations involve issues of free speech,[262] it is incumbant upon the state to mitigate interference with these first amendment freedoms, for it has been said that:

> [C]onstitutional safeguards are intended to protect the rights of all citi-

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[258] For another example of such a notice requirement, see Sostre v. Otis, 330 F. Supp. 941 (S.D.N.Y. 1971), where the court enjoined further censorship of incoming books and periodicals unless the inmate was given notice that the literature was being censored or withheld, an opportunity to be heard, and unless the censorship decision was rendered by a body that could be expected to act fairly.

[259] Singer, *Censorship of Prisoner's Mail and the Constitution*, 56 A.B.A.J. 1051 (1970) [hereinafter cited as Singer].

[260] Palmigiano v. Travisono, 317 F. Supp. 776, 786 (S.D.N.Y. 1970).

[261] Note, *The Right of Expression in Prison*, 40 S. CAL. L. REV. 407, 408 (1967) [hereinafter cited as Note].

[262] Note, *supra* note 58, at 676.

> zens, including prisoners, especially against official conduct which is arbitrary, particularly in the area of . . . First Amendment freedoms.[263]

Consequently, any arbitrary denial of the opportunity to send and receive mail is unjustified.

This view is even stronger when it is considered that censorship or absolute prohibition of outgoing letters violates the rights of the inmates' correspondents.[264] Certainly, they have a right to hear the inmates' views and criticisms whether they be a political expression of Black Panther philosophy or criticism of the prison environment.

> It should also be kept in mind that we are here concerned not only with the First Amendment rights of plaintiffs but also with the rights of all persons or institutions outside the prison who wish to correspond with the plaintiffs.[265]

The Supreme Court has indicated beyond question that the first amendment guarantees the right to receive and have access to ideas and information.[266]

> [T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.[267]

Moreover, in examining the justifications offered for censorship or denial of the opportunity to send and receive mail, it should be remembered that restrictions upon mail may have a deleterious affect on prisoner rehabilitation. Indeed, Chapter Five of the *Task Force Report* suggests that liberalization of policies governing visits and letters for inmates is also helpful in order to move away for the outdated custodial institution because "the emphasis on a myriad of rules, unexplained to inmates and often unreasoned in their operation, hardly educates a prisoner in the values of order in society."[268] Consequently, arbitrary mail rules can hardly be justified in the name of rehabilitation.

> Compared with the prevalence of prison influences, letters from the outside appear insignificant. The symbolic act of suppression by an administrator is probably more harmful than their slight anti-rehabilitative influence. It would seem that rehabilitation as an incarcerative purpose cannot justify the restriction or suppression of material that is allegedly detrimental to the inmate's rehabilitation.[269]

Another commentator takes this view more strongly:

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263 Jackson v. Godwin, 400 F.2d 529, 533 (5th Cir. 1968).

264 *Id.*

265 Palmigiano v. Travisono, 317 F. Supp. 776, 786 (S.D.N.Y. 1970).

266 Stanley v. Georgia, 394 U.S. 557, 564 (1969).

267 Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Concurring opinion of Mr. Justice Brennan joined by Justices Goldberg and Harlan).

268 TASK FORCE REPORT, *supra* note 11, at 47.

269 Note, *supra* note 260, at 419.

> The harm censorship does . . . cannot be gainsaid. Inmates lose contact with the outside world and become wary of placing intimate thoughts or criticism of the prison in letters. This artificial increase of alienation from society is ill advised. Additionally, the limit on the number of letters a prisoner may send or receive (because there are not sufficient personnel to read unlimited mail) is clearly in violation of the concept that the prisoner should be encouraged to remain in contact with his outer world acquaintances and friends.[270]

Indeed, this author has found not one article or professional opinion where it was asserted that any form of general censorship or mail restriction has benefitted rehabilitation.

Although arguments are made that limits upon the persons to whom letters may be sent benefit rehabilitation, it would seem that any such benefit is marginal. If this is weighed against the first amendment rights of the inmate to communicate and his correspondent to receive, prison officials would have an almost insurmountable burden to justify any prohibitions upon the persons with whom the inmate may correspond.

D. *Justifications for Restrictions*

Since both the commands of the first amendment and the interest in rehabilitation argue against any mail restrictions, the reasons offered for such limitations must be analyzed to determine what restrictions, if any, are justified. In the past, at least eight different reasons have been given for current prison mail practices.

(1) To assure compliance with prison rules.

(2) The administrative costs of censoring and processing many letters would be high.

(3) Prisoners will enter into illegal outside activities or conspiracies.

(4) To prevent escape plans from being made.

(5) To protect sensibilities of persons outside and to prevent criticism of the institution.

(6) To keep out pornography, which causes perverse sexual behavior.

(7) To prevent the introduction of contraband and weapons into the prison.

(8) To screen out inflammatory writing that could incite the prisoners.

Of these reasons the first two clearly offer no justification for the restriction of mail rights because if there were no restrictions, there would be no mail rules to comply with or censorship costs to justify a restriction on the number of letters that a man could send or receive. Moreover, it seems far-fetched to assert that mail restrictions prevent entry into illegal conspiracies, since nearly all prisons permit visitation without censorship and any conspiratorial plans to be made could be made at that time. Except for

[270] Singer, *supra* note 258, at 1054.

the recent trial of the Harrisburg Seven, no example has been found in any case or article where such planning was alleged to have occurred. Therefore, the fact that "the general practice in prisons throughout the United States is to allow free conversation between prisoners and their visitors"[271] seems to indicate that there is no real need to censor in order to prevent escape plans from being made.[272] The protection of public sensibilities is certainly not a serious justification because the prison officials "are not the protectors of the sensibilities of the public which can protect itself."[273] Criticism of prisons and their practices should undoubtedly be made more public since the institutions are generally inadequate and "an attitude which smothers information to the public about prisoners and prison life . . . serves no rational social purpose supportive of prison objectives."[274]

The last three reasons all relate to excluding items from the institution. Whether or not any of them are accepted, there does seems to be no legitimate need to censor or to restrict either the number of letters sent or their addressees. Thus, the writer is in agreement with the court's ruling in *Palmigiano v. Travisono* that:

> [T]he reading of any outgoing mail from the inmates is unnecessary and in violation of the First Amendment rights of the parties involved unless pursuant to a duly obtained search warrant, and in the absence of the same no outgoing prisoner mail may be opened, read or inspected.[275]

The availability of a search warrant should be enough to protect prison discipline when the officials reasonably believe that some crime is being committed. Reason number six, that pornography stimulates perverse sexual behavior in the institutions, has been asserted only once and was properly rejected by the *Palmigiano* court as "a matter of conjecture and opinion on the part of prison officials."[276] At no time have other writings or official statements ever substantiated this bald assertion by Rhode Island officials.

The two remaining reasons offer somewhat more persuasive considerations for some mail regulations. First, the introduction of contraband, weapons, and escape tools into the prisons could be a serious problem, particularly in a setting of close confinement where tempers can easily flair. This is especially true in view of the drug problems currently facing many prisons. Thus, the crux of legitimate concern with mail restrictions and censorship is whether the officials will be able to maintain prison discipline and security without these measures. However, this does not justify the reading of an inmate's incoming mail; rather it would seem to permit only

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[271] Palmigiano v. Travisono, 317 F. Supp. 776, 791 (S.D.N.Y. 1970).

[272] *See also* Singer, *supra* note 258, at 1054-55.

[273] TASK FORCE REPORT, *supra* note 11, at 27.

[274] *Id.* at 26.

[275] 317 F. Supp. 776, 791 (S.D.N.Y. 1970). *Accord*, Singer, *supra* note 258, at 1054-55.

[276] 317 F. Supp. at 783.

the inspection of packages for contraband and possible weapons.[277] Finally, the consideration that would require the reading of mail and periodicals is difficult to assess because it is never easy to ascertain what writing would be sufficiently "inflammatory" to cause disruption and justify suppression of first amendment interests. The fact that the lower-ranking prison officials who would administer such a test are likely to screen out more than is necessary should not be overlooked. Moreover, there is little, if any, proof that such writings have caused prison disruption in the past.

E. *A Suggested Clear and Present Danger Test*

Because of the substantial first amendment considerations it is apparent that mail regulations should meet more than the reasonableness test of due process.[278] Instead, some form of the clear and present danger test as enunciated in *Schenck v. United States*[279] and modified in *Dennis v. United States*[280] should be employed. Recently, an intelligent formulation of this test in the prison context was put forth by Judge Tuttle of the Fifth Circuit:

> [In the area of first amendment freedoms] we have pointed out that stringent standards are to be applied to governmental restrictions . . . and rigid scrutiny must be brought to bear on the justifications for encroachments on such rights. The State must strongly show some substantial and controlling interest which requires the subordination or limitation of these important constitutional rights, and which justifies their infringment . . .; and in the absence of such compelling justification the state restrictions are impermissible infringements of these fundamental and preferred rights.[281]

A recent comprehensive survey of inmate rights in Iowa agreed with this position when it concluded:

> Nevertheless, inquiring only whether a rational administrator could have acted as he did to achieve a legitimate end fails to consider all relevant factors, and may in fact unjustifiably deny an incarcerated individual his first amendment rights. Therefore, it seems that a clear and present danger analysis should be adopted by the courts to protect the prisoner's first amendment freedoms.[282]

With the adoption of such a test there could be no justification for any form of censorship or restriction of correspondents in order to prevent in-

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[277] It may be unrealistic, however, to enforce a rule which would allow prison guards and officials to open and inspect letters and packages for drugs and weapons, but would not permit them to read the contents of the letters.

[278] Note, *supra* note 58, at 675.

[279] 249 U.S. 47 (1919).

[280] 341 U.S. 494 (1951).

[281] Jackson v. Godwin, 400 F.2d 529, 541 (5th Cir. 1968). *See also* Shelton v. Tucker, 364 U.S. 479 (1960) and Palmigiano v. Travisono, 317 F. Supp. 776 (S.D.N.Y. 1970), where this test is adopted.

[282] Note, *supra* note 58, at 675.

flammatory writings from entering the prison—at least until a great amount of specific proof is offered to show that a real and imminent danger exists.[283]

Thus, following the *Coffin* approach, "[j]udicial adoption of the view that prisoners are people, that they will be free again, and that they retain all those rights not necessarily stripped from them by the obvious needs of the prison would result in startling changes in the lives of most inmates of most penal institutions."[284] The right to communicate by mail would be one of the most startling changes.

VII. CRUEL AND UNUSUAL PUNISHMENT

Obviously, prisoners retain the right to be free from cruel and unusual punishment under the ban imposed by the eighth amendment. A contention that this right has been violated usually arises in claims by prisoners who allege that disciplinary punishment has been excessive. Unfortunately, however, this eighth amendment prohibition is a vague one; and the Supreme Court has done little to clarify its meaning in a way helpful to a court considering a prison case. The Court has indicated that there are two types of proscribed punishment under this amendment. The first type involves treatment which is in itself inhumane: "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."[285] Moreover, the amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[286] The other type of proscribed punishment is that which is disproportionate to the offense for which it is imposed. In *Weems v. United States*[287] the Court said that it is a "precept of justice that punishment for crime should

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283 For a decision relevant to the censorship of incoming mail, see Seale v. Mason, 326 F. Supp. 1375 (D. Conn. 1971), where the court held that censorship or exclusion of reading materals would be justified only upon a finding of a clear and present danger to prison morale, morality, discipline or security. *See also* Sostre v. Otis, 330 F. Supp. 941, 944-45 (S.D.N.Y. 1971), an action to enjoin interference with the receipt of literature ordered through the mail, where the court said:

> We accept the premise that certain literature may pose such a clear and present danger to the security of a prison, or to the rehabilitation of prisoners, that it should be censored. . . . Some censorship or prior restraint on inflammatory literature sent into prisons is, therefore, necessary to prevent such literature from being used to cause disruption or violence within the prison. . . . On the other hand, while prisoners are obviously not entitled to all of the rights of free citizens, we would be loath to find that an individual's right to read such literature as he chooses, provided no substantial danger of disruption is presented, is expressly or impliedly lost upon his incarceration, Coffin v. Reichard, . . . or that this right is any less significant than the right to be free from arbitrary, capricious, or unwarranted punishment.

284 Singer, *supra* note 258, at 1055.

285 Trop v. Dulles, 356 U.S. 86, 100 (1958).

286 *Id.* at 101.

287 217 U.S. 349 (1910).

be graduated and proportioned to offense."[288] But how have courts applied these standards in a prison context?

A. *Prison Conditions*

In a small but rapidly growing number of cases, the courts have held that the conditions within a particular prison or an entire prison system were so inhumane as to amount to cruel and unusual punishment of all the inmates. The first of these cases followed soon after a habeas corpus proceeding in which an Oregon court prohibited extradition of an escaped Arkansas prisoner.[289] In an unreported opinion the court announced:

> Arkansas conducts at her two penal institutions, Cummins and Tucker, a system of barbarity, cruelty, torture, bestiality, corruption, terror, and animal viciousness that reeks of Dachau and Auschwitz . . . . Arkansas debases the base . . . [and] apparently is convinced that fleshly sin of men forfeits all rights of prisoners to any consideration and respect of humanity.
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> . . . .
>
> Arkansas prisons are institutions of terror, horror, and despicable evil.[290]

A possible forerunner to this case was *Ex parte Pickens*, a case in which a district court in Alaska surveyed the terrible conditions in the Anchorage city jail and stated, "Altogether, the place is not fit for human habitation . . . ."[291]

In a class action attack on the Arkansas prison system brought in 1970, a federal district court held that confinement in the then existing prison system violated the eighth amendment.[292] The court stated that if the state were going to run a prison farm system, "it [was] going to have to be a system that is countenanced by the Constitution . . . ."[293] Rather than granting individual relief, the court ordered prison authorities to submit a plan for bringing the system within constitutional standards and specified certain minimum steps to be taken. Among the factors considered by the court in reaching its decision were abuse by the trusty guards, stabbings, sexual assaults, the presence of alcohol and drugs, and the absence of any rehabilitation service.[294] This holding was affirmed on appeal.[295] Violations of eighth amendment were also found in two other actions attacking jail conditions prior to 1971. In a suit seeking an injunction

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288 *Id.* at 367. *See also In re* Kemmler, 136 U.S. 436 (1890).

289 Stephens v. Dixon, Habeas Corpus No. L-3112 (Baker County Cir. Ct. Ore., May 31, 1967) (unreported).

290 *Id. See also* 84 HARV. L. REV. 456 (1970); 6 CRIM. L. BULL. § 2, at 250 (June 1970).

291 101 F. Supp. 285, 287 (D. Alas. 1951). However, the court denied relief because of the total release approach to habeas corpus. *See also In re* Ellis, 76 Kan. 368, 91 P. 81 (1907).

292 Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

293 309 F. Supp. at 385.

294 For a more general discussion of the Cummins prison farm, *see* MURTON & HYAMS, ACCOMPLICES TO THE CRIME (1969).

295 Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971).

against inhumane treatment in the Cook County Jail,[296] the judge noted that the allegation if proven would constitute cruel and unusual punishment. Plaintiffs alleged that:

> [T]he inmates were deprived of adequate food, sanitation, recreational facilities, and medical attention, and were in constant fear of being beaten, burnt, or sexually assaulted. The grand jury found that to preserve order the warden relied upon inmate "barn bosses" who extorted money and food from other prisoners and sold bedding and medicine . . . and that the guards . . . did not interfere with the beatings and sexual attacks.[297]

In *Bryant v. Hendrick*,[298] the Philadelphia Court of Common Pleas noted that the evidence presented was very similar to that presented in *Holt*, including overcrowding, filth, homosexual and other assaults, brutal guards, and lack of any rehabilitation program. These conditions were held to be cruel and unusual punishment; and the court ordered transfer of the two plaintiffs and allowed 30 days for improvement of prison conditions.

The trend of these cases continued in 1971 and gained momentum as various courts found that inmates were being subjected to cruel and unusual punishment in the Lucas County, Ohio, jail,[299] the Little Rock, Arkansas county jail,[300] and the Maryland Defective Delinquent Institution at Patuxent.[301] The findings were based on many aspects of the institution, but in each case the court found conditions similar to those found in *Holt* and *Bryant*: overcrowding, bad lighting, lack of personal hygiene equipment, poor medical care, unsanitary conditions, censorship, restricted visitation, poor food, and a lack of exercise, recreation, or rehabilitation facilities. In addition, each of these courts ordered the adoption of a number of very specific practices and the improvement of many of the facilities, which will require a great deal of expense and effort to achieve. These cases significantly differ from the approach in *Holt*, where the court ordered the officials of the prison system to submit a plan for improving the facilities rather than doing the job itself.

Thus, all prisoners have the right to be free from inhumane conditions,

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296 Inmates of Cook County Jail v. Tierney, No. 68 C. 504 (N.D. Ill., filed April 8, 1968).

297 6 CRIM. L. BULL. § 2, at 237 n.5 (June 1970).

298 7 CR. L. REP. 2463 (Phil. County C.P., Pa., Aug. 11, 1970).

299 Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), aff'd sub nom. Jones v. Metzger, No. 71-1865 (6th Cir. Mar. 14, 1972). *See also* Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971) in which the court ordered the specific improvement of certain jail conditions and operations.

300 Hamilton v. Love, 9 CR. L. REP. 2293-94 (E.D. Ark. 1971).

301 McCray v. State, 10 CR. L. REP. 2132 (Montgomery County Cir. Ct. App., Md., Nov. 11, 1971). *See also* Nolan v. Smith, Nos. 6228, 6272 (D. Vt. June 29, 1971) where the court found that inmates in protective segregation, who were both neglected and housed in the worst section of the ancient prison, were denied equal protection. The court noted, "Coupled with an almost inhuman cold resulting from the combination of Vermont winters and insufficiently maintained and inadequate facilities, this lack of opportunity for exercise and recreation creates more than a semblance of a cruel and unusual punishment question." *But see* Pingly v. Coiner, 10 CR. L. REP. 2367 (W. Va. Sup. Ct., Jan. 25, 1972).

but the courts seem to be using a case by case approach in order to determine when a violation of the eighth amendment has occurred. Moreover, it appears that many different evils must exist before a broad ruling will be made; and one or two substandard conditions will undoubtedly be insufficient for a court to castigate an entire prison or penal system. Nevertheless, such supervision by the courts is proper because the state has a duty to treat its inmates humanely[302] and no legitimate state interest exists for maintaining such conditions. Indeed, inhumane prisons breed an "inmate culture" and lead to recidivism.

In this kind of case the court can threaten to order the release of all prisoners if conditions are not improved. Such action was threatened in *Bryant*, *Hamilton*, and *Holt*;[303] and in the latter case this threat seems to have been an effective means of bringing about improvement in the prison system because "it places the burden upon the state to correct fundamental deficiencies in the system, rather than merely providing *post facto* relief for a single aggrieved prisoner."[304] Thus, in Arkansas additional funds have been obtained to improve the system, new supervisory employees have been added, the power of trusty guards has been reduced, weapons have been confiscated, and there has been a decrease in physical assaults among the inmates.[305] Ordering the release of prisoners would be a drastic remedy, but official inaction would certainly be placed in the limelight by such an order. One alternative to wholesale release would be to order the transfer of the inmates to other facilities, but this would often be unworkable because of a lack of space. Another alternative to wholesale release would be to hold in contempt those officials who fail to obey a court order to improve conditions. With this remedy, however, there would not be as much public reaction to the problem and consequently a greater chance of legislative inaction. Furthermore, individual correctional officials will often lack the resources necessary for the wholesale improvement of a prison or penal system.

B. *Individual Conditions and Punishments*

It is well established that neither segregation,[306] nor solitary confinement,[307] nor being struck by a guard,[308] nor corporal punishment alone

302 Trop v. Dulles, 356 U.S. 86 (1958); Johnson v. Dye, 175 F.2d 250 (3d Cir. 1959), *rev'd per curiam*, 338 U.S. 864 (1949).

303 *E.g.*, Hamilton v. Lowe, 9 CR. L. REP. 2293, 2295 (E.D. Ark., June 2, 1971): "This Court . . . can and must require the release of persons held under conditions which violate their constitutional rights, at least where the correction of such conditions is not brought about within a reasonable time."

304 84 HARV. L. REV. 456, 462.

305 *Id.* at 462-63 n.36.

306 Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967).

307 Kostal v. Tinsley, 337 F.2d 845 (10th Cir. 1964); Beishir v. Swenson, 331 F. Supp. 1227 (W.D. Mo. 1971); Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970).

308 Cullum v. Cal. Dept. of Corrections, 267 F. Supp. 524 (N.D. Cal. 1967).

constitutes cruel and unusual punishment.[309] Although whipping with a cat-o-nine tails was long ago held not to violate the constitution,[310] more recently whipping by the strap in Arkansas was held to contravene the eighth amendment.[311] Such individual practices as chaining to cell bars,[312] requiring heavy physical labor from inmates in poor physical condition,[313] a bread and water diet intended to physically debilitate the prisoner,[314] and the use of the telephone or teeter board to discipline prisoners[315] have all been held unconstitutional. In fact, one court has held that denying regular outdoor exercise necessary for health violated the eighth amendment rights of a death row inmate housed under a statute requiring solitary confinement.[316]

Although each of these cases represents one specific practice, many other cases are litigated in which no one condition or punishment is cruel and unusual, but in which all conditions together are examined. The kind of decision to be made in these cases is necessarily quite subjective and there is no coherent body of law in this area. Instead, courts seem to follow the principle that when conditions violate their own concept of the "evolving standards of decency,"[317] they will intervene. Naturally, this produces inconsistent results. Perhaps, one can perceive what the law regards as impermissible punishment by examining the kinds of claims that have been rejected as opposed to those that have been accepted. For example, in *United States ex rel. Yaris v. Shaughnessy*[318] close confinement in a hot and stuffy room and the denial of recreation and other privileges was permissible. Another court found that no federal right was violated when a prisoner alleged that he received vicious beatings, solitary confinement for two months without clothes or blankets, no food for five days, and a denial of privileges.[319] In *Landman v. Peyton*[320] the court held that it was not cruel and unusual punishment when an inmate was not permitted to work while in maximum security, received only two meals per day, had access neither to the library nor to educational classes, had no radio or television, was allowed only one bath per week, and was occasionally tear gassed. More-

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309 Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967).

310 *In re* Candido, 31 Hawaii 982 (1931).

311 Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

312 *In re* Birdsong, 39 F. 599 (S.D. Ga. 1889). Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), held that chaining or handcuffing an inmate while in his cell violated the eighth amendment.

313 Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965).

314 Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

315 Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967).

316 Sinclair v. Henderson, 331 F. Supp. 1123 (E.D. La. 1971).

317 Trop v. Dulles, 356 U.S. 86, 101 (1958).

318 112 F. Supp. 143 (S.D.N.Y. 1953).

319 United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956).

320 370 F.2d 135 (4th Cir. 1966).

over, while he had been placed in solitary the inmate had no visits, was given bread and water for every two out of three days, and had no underwear, combs, toothbrushes, or razors, and very little bedding. In *Siegel v. Ragan*[321] an inmate was forced to sleep on a cement floor in solitary, was chained by his wrist, fed bread and water for six out of every seven days, and spent 92 days subject to this treatment with only one bath. Such treatment was held to be constitutionally permissible.[322]

Cases holding an individual punishment to be cruel and unusual have very little to distinguish them from cases not granting relief, although occasionally the facts of a particular situation may seem more outrageous. Significantly, however, most of the cases granting relief on these grounds are fairly recent, indicating the greater willingness of the courts to intervene to protect inmate rights. For example, confinement in segregation for only two and one half days was recently held to be unconstitutional when two inmates were confined to a six by twelve foot cell without windows, lights or exercise; were placed on reduced diets, subjected to a strip frisk; were given no clothes, bedding, sheets, or toilet articles; had only one commode and one steel bed without a mattress; and had only one blanket and towel—the blanket had to be used as a mop for the toilet overflow which had splashed onto the floor.[323] Two other fairly similar cases illustrate perhaps the worst conditions litigated; and of the two perhaps *Jordan v. Fitzharris*[324] is the worse.

In *Jordan* an inmate was confined in a six by eight concrete strip cell that was without light for 12 days. Moreover, the cell lacked heat and was unclean, the toilet was flushed only twice each day from the outside, and plaintiff had no means to clean himself even after vomiting. No sanitary precautions were taken with his food. He was naked for the first eight days of confinement and thereafter was given only a rough pair of overalls. For sleep, he had only a stiff canvas mat smaller than himself placed on the cold floor. The court noted that this punishment "shocked its conscience."[325] In another recent case, dealing with conditions nearly as ter-

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321 88 F. Supp. 996 (E.D. Ill. 1949). *See also* Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970) (inmate was confined to maximum security for 3 years); Ford v. Dd. of Managers, 407 F.2d 937 (3d Cir. 1969) (no running water or wash bowl; bread and water diet except one regular meal every third day).

322 *See also* Novak v. Beto, 10 CR. L. REP. 2241 (5th Cir. Dec. 9, 1971), where the court held over a strong dissent that the solitary confinement of an inmate for 9 weeks was not cruel and unusual punishment even though his head was shaved, he was provided only scanty clothing, his cell was totally deprived of light, he was not permitted to exercise, and was placed on a starvation diet of one meal every three days except for black bread and water. This decision seems somewhat inconsistent with many recent cases such as Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), where the court held that the eighth amendment was violated by a bread and water diet.

323 Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969).

324 257 F. Supp. 674 (N.D. Cal. 1966). The other case is Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969), *aff'd on other grounds*, No. 71-1203 (6th Cir. Jan. 5, 1972).

325 For other cases where confinement was held to be a cruel and unusual punishment, *see*

rible, including no heat in a cold northern New York winter, the court said:

> The subhuman conditions alleged . . . to exist in the "strip cell" at Dannemora could only serve to destroy completely the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treatment so foul, so inhuman and so violative of basic concepts of decency.[326]

However, the recent Second Circuit decision in *Sostre v. McGinnis*[327] indicates that fine lines will be drawn in making such a determination, for it overruled a lower court finding of cruel and unusual punishment for a 13 month solitary confinement even though the warden's motives for such confinement were deemed to be improper. Sostre had been isolated without another person in his cell block for nine of these 13 months, had no recreation or work, had lost all group privileges, and was allowed only one hour's exercise per day which he refused because it was conditioned upon a strip frisk. District Judge Motley found that the isolation imposed upon Sostre was "dangerous to the maintenance of sanity"[328] and "could only serve to destroy completely the spirit and undermine the sanity of the prisoner."[329] But the circuit court deferred to the practices of the prison officials and did not even uphold the district court's limit of 15 days upon any future solitary confinement. The circuit court noted the factors it considered important:

> In arriving at this conclusion, we have considered Sostre's diet, the availability in his cell of at least rudimentary implements of personal hygiene, the opportunity for exercise and for participation in group therapy, the provision of at least some general reading matter . . . and the constant possibility of communication with other segregated prisoners.[330]

Certainly a sentence of imprisonment does not imply disciplinary punishment under poor conditions. Indeed, *Coffin* suggests that an inmate cannot be subjected to barbaric disciplinary punishment; but, unfortunately, this view does not assist one in deciding what practices are impermissible. Instead, an examination of disciplinary punishment which balances the interests of the inmate against those of the prison is a better approach to determining what disciplinary practices are impermissible.[331] As a first

Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970); Howard v. State, 237 P. 203 (Sup. Ct. Ariz. 1925).

326 Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967). The inmate was stripped naked, had no heat, the filthy cell was barren, there were no toilet articles and he was forced to sleep on a cold concrete floor. This occurred on two occasions, one lasting 33 days, the other lasting 21.

327 442 F.2d 178 (2d Cir. 1971).

328 Sostre v. Rockefeller, 312 F. Supp. at 868.

329 *Id.* at 871.

330 442 F.2d at 193-94.

331 For some of the most recent cases in which courts have held that individuals were subjected to cruel and unusual punishment, *see* Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971) (untried arrestees); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Sinclair v. Hender-

principle, both case law and enlightened practice suggest that any corporal punishment should be unconstitutional. Both *Talley v. Stephens*[332] and *Jackson v. Bishop*[333] suggest this. Moreover, use of corporal punishment is "brutal and medieval and [does] no real good."[334] James V. Bennett, former director of the Federal Bureau of Prisons, and Fred Wilkerson, Director of Missouri Corrections, recently testified that use of corporal punishment for discipline is useless and should be abolished because it serves no legitimate correctional purpose.[335]

The institutional interest in disciplinary punishment is to deter and to punish disruptive behavior of inmates and to separate "incorrigibles" from the rest of the prisoners to preserve safety and order.[336] Certainly the separation of an unruly inmate to solitary confinement with humane conditions is sufficient to preserve safety and order. For this purpose the deprivation of light and heat, small and unclean cells, no toilet articles, reduced diet, and improper sanitation are all unnecessary. Consequently, one must ask if such deprivations are justified by retribution or for any deterrant value. No proof has ever been put forth to show that such practices have any deterrent effect on improper behavior and in fact it is often the same offenders who are repeatedly confined to these solitary cells. Certainly other, less loathsome methods of punishment exist: reduced privileges, no work, loss of good time, or confinement to one's cell. Therefore, it would seem that no purpose is furthered by inadequate cell conditions in solitary confinement except vengeance, which today has lost much of its acceptance as a legitimate correctional goal.[337] Thus, in cases considering such base confinement conditions, courts should hold that the lack of these basics constitutes an impermissible cruel and unusual punishment.

Certainly precedent for such action exists. Even if there are not a large number of specific deprivations in segregation, nothing should prevent a court from declaring unconstitutional any punishment that deprives an inmate of rehabilitative opportunities such as work, education, or mail and visitation rights, so long as no legitimate correctional interest is served by such deprivations. This is especially true when many of the punishments involve action detrimental to rehabilitation and even sanity. In order to justify harsh disciplinary punishment, administrators should be able to show that another punishment with less onerous conditions would not achieve

son, 331 F. Supp. 1123 (E.D. La. 1971); Lollis v. N.Y. State Dept. of Social Services, 322 F. Supp. 473 (S.D.N.Y. 1970) (juvenile).

[332] 247 F. Supp. 683 (E.D. Ark. 1965).

[333] 268 F. Supp. 804 (E.D. Ark. 1967).

[334] *Id.* at 813.

[335] *Id.* at 813-814.

[336] Such reasons have been offered in Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); and Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

[337] TASK FORCE REPORT, *supra* note 11.

their purposes and that the harsher punishment does not interfere with rehabilitation programs. Without at least this justification, punishment would seem to violate "evolving standards of decency."[338]

C. *Disporportionate Punishments*

A few courts have held that long periods spent in segregated confinement constituted cruel and unusual punishment because the punishment imposed was disproportionate to the offense committed. Influential in these decisions, no doubt, were the conditions under which such confinement was spent. For example, Judge Motley in *Sostre* held that even if the reason given by the warden for Sostre's thirteen month segregation—that he possessed another inmate's legal papers in violation of a rule—had been believed, this fact still would have amounted to a cruel and unusual punishment.[339] The punishment in *Wright v. McMann*[340] was held to be grossly disproportionate when co-plaintiff Mosher was confined at length for refusal to sign a safety sheet because he felt that it would waive his right to damages for any possible injury. In *Jordan v. Fitzharris*[341] the court recognized that "a punishment may be cruel and unusual if greatly disproportionate to the offense for which it is imposed"[342] and indicated that the American Correctional Association's standards, which restrict punitive segregation to 15 days, would meet minimum standards required by the eighth amendment. In the leading case of *Fulwood v. Clemmer*[343] a Black Muslim was segregated for more than two years for preaching in a manner tending to breach the peace while on a recreation field. In concluding that this was an unreasonable punishment for the offense,[344] the court said:

> Despite the power of prison authorities to make proper rules and regulations for the government of prisoners, and to maintain discipline in the prison population, a prisoner may not be unreasonably punished for the infraction of a rule. A punishment out of proportion to the violation may bring it within the bar against unreasonable punishments.[345]

Although it is difficult to formulate a proper objective rule for this phase of cruel and unusual punishment, it is recognized that solitary confinement can be very degrading and demoralizing[346] and can erode the

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338 Trop v. Dulles, 356 U.S. 86, 101 (1958).

339 This holding was reversed on appeal. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).

340 387 F.2d 519 (2d Cir. 1967).

341 257 F. Supp. 674 (N.D. Cal. 1966).

342 *Id.* at 679.

343 206 F. Supp. 370 (D.D.C. 1962).

344 For other cases applying similar tests, see Roberts v. Pegelow, 313, F.2d 548 (4th Cir. 1963); United States *ex rel.* Raymond v. Rundle, 276 F. Supp. 637 (E.D. Pa. 1967). *See also* Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring).

345 206 F. Supp. at 379.

346 *See* Barnett v. Rodgers, 410 F.2d 995, 1002 (D.C. Cir. 1969); Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967).

foundations of any useful life. At least this is the view of commentators such as Goffman and Sykes.[347] Similarly, Judge Motley found that

> [P]unitive segregation under the conditions to which plaintiff [Sostre] was subjected at Green Haven [was] physically harsh, destructive of morale, dehumanizing in the sense that it [was] needlessly degrading, and dangerous to the maintenance of sanity when continued for more than a short period of time which should certainly not exceed 15 days.[348]

Given the availability of effective alternatives, what legitimate state interests are served when a punishment, particularly under these conditions, is so long that it is degrading and destroys mental health? The best rule is to apply an objective standard that would not permit abuse, such as that suggested by the American Correctional Association's *Manual on Correctional Standards*:

> Ordinarily no inmate should be retained in punitive segregation on restrictive diet more than fifteen days, and normally a shorter period is sufficient. Those who fail to make an adjustment under such conditions can often be treated more effectively in special administrative segregation facilities. The punitive segregation section should not be utilized for indefinite or permanent segregation.[349]

In addition, the A.L.I. *Model Penal Code* allows prison disciplinary segregation, but "not to exceed thirty days."[350] Currently many states do not have such time limits on punitive segregation either by statute or prison rule.[351] Thus, it seems that no valid prison interest is served by confinement for longer than some period of approximately fifteen to thirty days. Reasonable alternatives to such punishment exist; and if not used, the inmate may suffer serious mental harm. Therefore, lengthy solitary confinement, just as corporal punishment, should constitute a violation of the eighth amendment.

VIII. PROCEDURAL DUE PROCESS

The extent to which procedural due process guarantees apply to prisoners is not clear. Many different prison regulations and state statutes govern procedural rights for inmates in any proceeding that could result in punishments such as loss of good time, transfer to solitary confinement, or other serious deprivations of liberty.[352] In addition, courts are beginning to inquire into prison procedures that result in substantial additional dep-

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347 *See* R. DONNELLEY, J. GOLDSTEIN, & P. SCHWARTZ, CRIMINAL LAW 428-32 (1962).

348 Sostre v. Rockefeller, 312 F. Supp. 863, 868 (S.D.N.Y. 1970).

349 AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS at 683.

350 MODEL PENAL CODE, § 304.7(3) (Prop. Off. Draft 1962).

351 Jacob, *supra* note 53, at 241.

352 For examples of such regulations and statutes, see Jacob, *supra* note 53, at 242; Note, *supra* note 58, at 696-97.

rivations, although few specific procedural requirements have gained consensus acceptance. Nevertheless, it is relatively clear that:

> A prisoner carries with him to prison his right to procedural due process which applies to charges for which he may receive punitive segregation or any other punishment for which earned good time credit may be revoked or the opportunity to earn good time credit is denied.[353]

A. *The Traditional Approach*

Siegel v. Ragen[354] exemplies the traditional approach of the courts to an inmate's claim of a denial of due process in a prison disciplinary hearing. The inmate had been placed in solitary confinement with a loss of privileges by order of the warden without any hearing and was kept there for 92 days. The reviewing court invoked the "hands-off" doctrine and refused even to scrutinize the prisoner's contentions because the "matters alleged in the amended complaint are strictly matters of internal administration and discipline."[355] The Eight Circuit's treatment of *Burns v. Swenson*[356] illustrates that the traditional theory still has vitality. In *Burns* an inmate had been summarily segregated and confined in maximum security for three years, and six months passed before there was a review or hearing concerning his summary punishment. The court indicated that it was "loath" to interfere with state prisons, that no formal hearing was required, and that emergencies require the unilateral segregation of prisoners. Nevertheless, the view that prisoners retain procedural due process rights, a view consistent with the *Coffin* position, is beginning to win more acceptance in a number of prison situations.

B. *The Determination of a Disciplinary Violation*

Disciplinary hearings in prison often result in substantially additional burdens to inmates. Prisoners can, *inter alia*, lose good-time, be sent to isolation, forfeit various privileges, be locked in their own cells, be re-assigned to a more restrictive environment, and have offenses noted in their permanent file that is reviewed by the parole board. In keeping with the

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353 Sostre v. Rockefeller, 312 F. Supp. 863, 872 (S.D.N.Y. 1970). The United States Supreme Court has strongly implied that due process must be accorded a prisoner before he can be disciplined. In Haines v. Kerner, 40 U.S.L.W. 4156 (U.S. Jan. 13, 1972), an inmate brought a § 1983 action, complaining that he had been placed in solitary as a disciplinary measure. He alleged that he had suffered physical injuries because of the nature of that confinement and that there had been a denial of due process leading to his confinement. The district court dismissed for failure to state a claim, but the Supreme Court reversed, stating that "allegations such as those asserted by petitioner . . . are sufficient to call for the opportunity to offer supporting evidence." Nevertheless, *Haines* does not give any hint as to what such due process requirements might be.

354 88 F. Supp. 996 (N.D. Ill. 1949).

355 *Id.* at 999.

356 430 F.2d 771 (8th Cir. 1970).

recent rejection of the "hands-off" and abstention doctrine, a number of courts have found violations of due process rights in this kind of hearing.

A number of these decisions have indicated only that procedural due process standards were not met in the disciplinary hearing that resulted in punishment. For example, in *United States ex rel. Campbell v. Pate*[357] an inmate lost an opportunity for parole hearing because he had been transferred to a lower prison classification for a "conviction" that the inmate claimed resulted from an unreliable determination of the facts. Guards had found an orange powder in his cell that Campbell identified as Tang, a powdered drink that he was permitted to have. The guards, however, claimed that it was something else but refused to have it analyzed. The court indicated that a claim for relief was stated because the "relevant facts . . . must not be so capriciously or unreliably determined. . . ."[358] Another case that relied on due process, without enunciating any standards, was *Talley v. Stephens*[359] in which an Arkansas prisoner had been summarily whipped for alleged rule violations. The court enjoined use of the strap until its use was "surrounded" by appropriate due process safeguards. Nevertheless, as in *Campbell*, the court made no attempt to define what these safeguards might be.

A different approach, illustrated by *Nolan v. Scafati*,[360] *Sostre v. McGinnis*,[361] *Meola v. Fitzpatrick*,[362] and *Kritsky v. McGinnis*,[363] is one in which the court does not order adherence to certain procedures but does suggest what might be minimally required.[364] In *Nolan*, Judge Wyzanski indicated that

> Without deciding the matter, we may . . . assume that the due process clause requires . . . that before a prison authority imposes upon a prisoner a serious penalty . . . the authority must (1) advise the prisoner of the charge of misconduct, (2) inform the prisoner of the nature of the evidence against him, (3) afford the prisoner an opportunity to be heard in his own defense, and (4) reach its determination upon the basis of substantial evidence.[365]

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357 401 F.2d 55 (7th Cir. 1968).

358 *Id.* at 57.

359 247 F. Supp. 683 (E.D. Ark. 1965).

360 306 F. Supp. 1 (D. Mass. 1969), *vacated and remanded*, 430 F.2d 548 (1st Cir. 1970).

361 442 F.2d 178 (2d Cir. 1971).

362 322 F. Supp. 878 (D. Mass. 1971).

363 313 F. Supp. 1247 (N.D.N.Y. 1970). *See also* Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971).

364 This same judgment is also made by courts which implicitly reject the "hands-off" doctrine and decide that a certain disciplinary procedure is adequate. What they are actually doing is making a determination that the procedure employed meets minimal due process requirements. *See, e.g.*, Beishir v. Swenson, 331 F. Supp. 1227 (W.D. Mo. 1971).

365 306 F. Supp. at 3. On appeal, the First Circuit reversed the dismissal of the complaint and remanded for a hearing to determine, *inter alia*, whether the punishment was great enough to require procedural safeguards, and further stated that "some assurances of elemental fairness are essential when substantial interests are at stake." 430 F.2d 548, 550 (1st Cir. 1970).

In *Kritsky*, an inmate had been sent to segregation and had lost 18 months good-time. The court agreed with Judge Wyzanski in *Nolan* and indicated that his four requisites would probably be sufficient to meet due process standards. Similarly, the court in *Meola* stated that the punishments of segregation and loss of good time were sufficiently great to require procedural safeguards, "at least the elementary ones of notice of the charges against him and an opportunity to reply to them."[366] The *Meola* court, however, failed to indicate if these would always be sufficient safeguards. In *Sostre v. McGinnis* the court, in reversing a lower court's more stringent holdings, stated:

> If substantial deprivations are to be visited upon a prisoner, it is wise that such action should be least be premised on facts rationally determined . . . . In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him . . . and afforded a reasonable opportunity to explain his actions.[367]

Unfortunately, in none of these cases did the courts indicate whether or not the suggested procedures would always be sufficient or whether more or less might be required in specific situations.[368]

C. *Recent Developments*

A number of cases, including three New York Federal District Court decisions, began to expand and to delineate more precisely the notion of due process in prison, although the New York decisions may have been overruled by *Sostre v. McGinnis*.[369] These New York decisions, *Sostre v. Rockefeller*,[370] *Wright v. McMann*,[371] and *Carothers v. Follette*,[372] required the New York prison authorities to adopt new prison rules that included due process standards which the court had ordered. The procedures that were ordered to be adopted initially by Judge Motley in *Sostre* indicated that in a disciplinary hearing involving a possibly serious penalty an inmate was entitled to: (1) written notice of charges, (2) recorded hearing before a disinterested official, (3) the chance to cross-examine adverse witnesses and to call witnesses in his own behalf, (4) the right to retain counsel or counsel substitute, and (5) a written decision. The judges in

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366 322 F. Supp. at 886.

367 442 F.2d at 198.

368 For additional procedural due process cases in a prison setting not mentioned here, but recently decided, *see* Potter v. McCall, 443 F.2d 1087 (9th Cir. 1971); Sinclair v. Henderson, 331 F. Supp. 1123 (E.D. La. 1971); Lollis v. N.Y. Dept. Social Services, 322 F. Supp. 473 (S.D.N.Y. 1970); *In re* Owens, 9 CR. L. REP. 2415 (Cook County Cir. Ct. App. Ill., July 9, 1971).

369 442 F.2d 178 (2d Cir. 1971).

370 312 F. Supp. 863 (S.D.N.Y. 1970).

371 321 F. Supp. 127 (S.D.N.Y. 1970).

372 314 F. Supp. 1014 (S.D.N.Y. 1970).

Wright and *Carothers* recognized the lack of standards in the correctional system's disciplinary process but found it unnecessary to act because of Judge Motley's decision.

Prior to the New York cases, the first court decision that required comprehensive due process procedures in a prison hearing was a consent order entered in a class action challenging institutional classification and disciplinary systems at the Adult Correctional Institution at Cranston, Rhode Island.[373] This order was more comprehensive than any other given prior to that date. It dealt not only with procedural requirements at a disciplinary hearing but also with the entire procedural framework of the classification of inmates within the prison. The order established four categories of classification, required notice and the right to be assisted by a classification counsellor at any hearing, and further required that any decision be made only upon substantial evidence. Moreover, before disciplinary punishment could be imposed, a number of other procedures were required. These included a hearing for any offense, investigation and review by a superior officer, a record, no summary discipline without approval by a superior officer, a right to present information, and special emergency provisions.

In 1971 four additional due process decisions continued the trend toward precisely defining the perimeters of the fourteenth amendment in a prison context. These decisions all required the adoption of the procedural protections that Judge Motley had ordered adopted in *Sostre* and in some cases the court added additional requirements. *Bundy v. Cannon*,[374] a decision involving a Maryland state prison, approved new Department of Corrections rules and noted that a protracted term in solitary or a forfeiture of good-time would be sufficient to trigger these due process requirements. *Cluchette v. Procunier*[375] ordered a halt to disciplinary proceedings at San Quentin until the state instituted proceedings that would provide the basics of due process. The court ruled that due process required not only a decision by a fact finder uninvolved with the incident but also a written finding of the facts and notice of a right to appeal the decision whenever the hearing could result in a serious loss.[376] In addition, when the inmate is charged with a violation which may be punishable by state authorities, the

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[373] Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970).

[374] 328 F. Supp. 165 (D. Md. 1971). Although the state Department of Corrections issued this new set of rules, an interim opinion filed by the court on March 2, 1971 had required most of the procedural protections that ultimately appeared in the rules.

[375] 328 F. Supp. 767 (N.D. Cal. 1971). The court also ordered that notice must include a brief statement of the facts upon which the charge is based and contain the name and number of the rule violated. Moreover, seven days notice of the hearing was the minimal acceptable limit. Representation was to be provided by "counsel or counsel substitute."

[376] *Id.* at 785. The court defined what, at a minimum, "grievous loss" meant in terms of possible punishment: (a) indefinite segregation or indefinite confinement to the adjustment center; (b) referral to the Adult Authority for possible sentence increase; (c) a fine or forfeiture of earnings; (d) isolation for 10 days or more; (e) referral to the District Attorney for possible criminal prosecution.

prisoner *must* have counsel at any hearing and not merely a substitute for counsel. Similarly, in *Landman v. Royster*[377] the court applied due process requirements to disciplinary hearings in a Virginia state prison whenever solitary confinement, transfer to maximum security, lost of good-time, or 10 day padlock confinement was a possible penalty. For lesser punishments, the court ordered less stringent procedures. Moreover, the inmate could select a "lay advisor" for representation, presumably a staff member or another inmate. Finally, a Montgomery County Circuit Court in Maryland became the first state court to make a sweeping due process order when it required the same protections, including counsel, if the violation could be prosecuted as a crime.[378]

D. *The Developing Law*

The requirements of procedural due process in prison disciplinary hearings are just beginning to be precisely delineated. Nevertheless, courts have reached differing results; and it is impossible to predict the specific procedural safeguards that any particular prison administration might be required to apply in a disciplinary hearing that could result in the imposition of substantial punishment. Due process undoubtedly requires some minimal degree of procedural protection when serious punishment is possible. Therefore, a consensus is slowly developing to require that notice of the charges against an inmate be given, that a formal hearing be held, and that the inmate has the right to be heard in his own defense. Additionally, substantial authority has indicated that the safeguards of (1) representation by counsel or counsel substitute, (2) the right to present favorable witnesses and cross-examine unfavorable witnesses, and (3) an impartial body to render any decision are necessary; although it cannot now be said that such safeguards represent a consensus requirement.

It seems clear that inmates should retain procedural due process rights to some extent. Both the *Coffin* reasoning, which would require a strong justification to deny such procedural protections, and the principles enunciated by the Supreme Court in recent due process cases, which seem to apply to prisons as well as to other institutions, lead to this conclusion. Such cases as *In re Gault*,[379] *Mempa v. Rhay*,[380] *Specht v. Patterson*,[381]

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[377] 333 F. Supp. 621 (E.D. Va. 1971). The court also required that reasonable notice be given before the hearing and that any decision made must be based upon evidence presented at the hearing. Although the court did not require an appeal, it did say that any appeal decision must be restricted to this evidence.

[378] McCray v. State, 10 CR. L. REP. 2132 (Montgomery County Cir. Ct. App., Md., Nov. 11, 1971). This case involved procedures at the Maryland Institution for Defective Delinquents at Patuxent.

[379] 387 U.S. 1 (1967).

[380] 389 U.S. 128 (1967).

[381] 386 U.S. 605 (1967).

and *Goldberg v. Kelly*,[382] have led to the development of the principle that whenever there is a proceeding which can result in added restraints upon one's liberty, the proceeding must be surrounded by due process safeguards.[383] Similarly, the Second Circuit has recently stated:

> *Escalera* and *Goldberg* are persuasive recent authority that states may not avoid the rigors of due process by labelling an action which has serious and onerous consequences as a withdrawal of a "privilege" rather than a "right." *Mempa* warns us that procedural formality may be required in the operation of the criminalization and incarceration process beyond the determination of guilt at trial. Thus, we do not doubt that Sostre was entitled to "due process of law" before he was punished for an infraction of prison rules.[384]

Because disciplinary hearings can impose severe punishments, this must be the correct view for them. Indeed, loss of good time "has some of the characteristics of extending a sentence"[385] and long terms of solitary can affect a man's sanity.[386]

In addition, modern correctional theory regards due process at such hearings as essential.[387] The *Task Force Report* emphasizes the need for fair procedures and their relationship to the desired "collaborative regime."

> The necessity of procedural safeguards should not be viewed as antithetical to the treatment concerns of corrections. The existence of procedures both fair in fact and perceived to be fair by offenders is surely consonant with the "collaborative regime" emphasized as desirable by modern corrections, in which staff and offenders are not cast as opponents but are united in a common effort aimed at rehabilitation. In a prison no less than in society as a whole, respect for, and cooperation with authority requires the guaranty of fairness.[388]

Moreover, the existence of fair and adequate procedures would lend to the federal courts a greater assurance that discretion is properly exercised; and when review becomes necessary, the factual findings of an administrative panel would be entitled to greater weight than any sort of system without procedural safeguards.[389] If procedural due process rights are retained by inmates, the balancing test implicit in *Coffin* suggests that "the difficult question, as always, is what process was due?"[390]

A valid first principle in the due process area would seem to be that "the greater the impact on the conditions of present or prospective liberty,

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382 397 U.S. 254 (1970).

383 Jacob, *supra* note 53, at 245.

384 Sostre v. McGinnis, 442 F.2d 178, 196 (2d Cir. 1971).

385 Nolan v. Scafati, 430 F.2d 548, 550 n.2 (1st Cir. 1970).

386 *See* Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970).

387 Barkin, *supra* note 132.

388 TASK FORCE REPORT, *supra* note 11, at 13.

389 *Prisoner's Rights Under Sec. 1983*, 6 CRIM. L. BULL. § 2 (June, 1970).

390 Sostre v. McGinnis, 442 F.2d 178, 196 (2d Cir. 1971).

or the physical and psychic integrity of the prisoner, the greater (or more plausible) the claim to substantive and procedural safeguards."[391] Nevertheless, in any disciplinary hearing, in order to further the ends of fairness and to assure valid factual determinations, there would seem to be required, at a minimum, rules that are announced in advance that can be complied with,[392] notice of any infraction, a hearing, and a chance for the inmate to explain himself.[393] Most of the recent due process decisions have required as much.[394] Indeed, these protections are now present in hearings in many correctional systems today. For example, the Federal Bureau of Prisons,[395] Rhode Island,[396] and Iowa[397] prisons abide by such rules and seem to function at least as well in terms of discipline as do other systems. Moreover, no correctional administrators in these systems have indicated that any of these procedures are overly burdensome or that they provide insurmountable difficulties to prison administration.

However, when a hearing involves a more serious offense, like a long-term isolation or loss of substantial amounts of good-time, then perhaps more should be required. Nevertheless, for each requirement added to a hearing, a greater tension between due process norms and administrative efficiency is created because procedural demands require greater time and effort than do quick *ex parte* determinations. Consequently, how do the requirements of substantial evidence, the right to call witnesses, cross-examination, representation, and an impartial hearing body fit into the proceedings? Some would take the view that nearly all are desirable procedures.

> The truth has a poor chance of emerging in any adjudicative proceeding in which the witness against the alleged offender is not present, the proof consists of a written hearsay statement of the prosecuting witness, and the defendant is not given an opportunity to cross-examine or present his witnesses.[398]

In this area of due process the *Task Force Report* distinguishes between less important decisions in which officials should not be overly restricted, where it would be enough to allow an opportunity to hear the basis of a proposed decision and to present relevant opposing facts and arguments, and more important determinations involving good time, which call for

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391 F. COHEN, IMPLICATIONS FOR MANPOWER AND TRAINING: THE LEGAL CHALLENGE TO CORRECTION: 78 (1969) [hereinafter cited as COHEN].

392 *Id.* *See also* Smoake v. Fritz, 320 F. Supp. 609 (S.D.N.Y. 1970); *In re* Owens, 9 CR. L. REP. 2415 (Cook County Cir. Ct. App., Ill., July 9, 1971).

393 COHEN, *supra* note 391, at 13.

394 *See* Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970).

395 Hirschkop and Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 830-34 (1969) [hereinafter cited as Hirschkop and Millemann].

396 *See* Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970).

397 Note, *supra* note 58, at 695.

398 Jacob, *supra* note 53, at 247.

notice, an opportunity to present evidence, confrontation and cross-examination of opposing witnesses, and the right to representation by counsel.[399] Indeed, disciplinary hearings in the Federal Bureau of Prisons seem to function smoothly, even though at any hearing serious enough to involve loss of good-time the inmate can be represented by a staff member, present evidence, call witnesses, confront his accuser, and cross-examine adverse witnesses.[400] This success would seem to indicate that the practical obstacles to such procedures are not immense and that such safeguards are certainly feasible. Moreover, the *Coffin* view of retained rights supported by the teachings of *Gault*, *Specht*, *Mempa*, and *Goldberg* would suggest that as many procedural rights must be retained as is feasible.

E. *Specific Procedural Requirements*

It should be emphasized at this point that any fear of disruption or disorder by prison officials must never justify the lack of a hearing. Rules might allow summary isolation of some kind,[401] but the holding of a hearing within a few days after any possible inflammatory situation is a reasonable alternative to counter official arguments that effective and efficient penal work requires summary punishment without a hearing.

1. Representation by Counsel

Although representation by counsel may be a desirable practice in terms of ascertaining facts and assuring fair procedures, it seems practically unfeasible.

> Perhaps the most troublesome element of due process in a prison setting would be a guarantee that inmates are entitled to trained counsel, because the practical problems involved in supplying counsel in all disciplinary proceedings would be great in terms of legal manpower, time, and financial requirements.[402]

Nevertheless, in prisons sponsoring law student projects, experience might reveal that representation by these students can be a legitimate alternative. A different practice now used in many systems, including the Federal Bureau of Prisons, is representation by a staff member. The widespread nature of this practice suggests that it is not difficult to achieve and that it has some desirable aspects. However, a recent study indicated that most inmates did not feel benefitted by such representation and suggested that this feeling might be due to the staff member's lack of time to prepare adequately, to conflicts over the nature of the staff member's role in the

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399 TASK FORCE REPORT, *supra* note 11, at 86.

400 Hirschkop and Millemann, *supra* note 395, at 834. Nearly the same is true in the Washington prison system. *See* Jacob, *supra* note 53, at 243.

401 As did the court order in *Morris v. Travisono*, *supra* note 394.

402 Jacob, *supra* note 53, at 246-47.

proceeding, and to the fact that most hearings involve only the testimony of the complaining officer as evidence.[403] Although these reasons suggest that such representation has limited usefulness, it may very well provide valuable assistance to many illiterate inmates and consequently should not be rejected unless a feasible alternative is presented.

2. Substantial Evidence Requirement

A recent Harvard study has indicated that the substantial evidence requirement is probably useless under current hearing conditions because most adjudications involve only testimony by guards and inmates; and the judging officials, who are co-workers of the charging officer, never disbelieve the charging officer.[404] This observation seems to have been substantiated by a deposition of Warden Follette in the *Sostre* litigation when he stated that, even in situations where he was not the complainant, he or whoever was judging would invariably believe a guard's report, since "the officers are not liars."[405] Consequently, until a disinterested person or board makes the determination at these hearings, this specific due process standard would seem to be a useless requirement. Indeed, the fact that hearings usually consist only of a guard's report or testimony in accusation and the inmate's confession or denial of guilt means that in most circumstances the hearing may not be a fact-finding process at all but something more akin to a sentencing proceeding.

3. Right to an Outside Adjudicator

Courts have just begun to look at the requirement of a disinterested adjudicator. Judge Motley required a recorded hearing before a disinterested official in *Sostre v. Rockefeller*[406] and Judge Mansfield suggested in *Carothers v. Follette* that for any serious charge due process required "a relatively objective tribunal."[407] However, neither of these orders contemplated the services of a person from outside the prison, which was required by the interim opinion of Judge Thomsen in *Bundy v. Cannon*.[408]

The presence of such an outsider would give meaning to the substantial

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[403] These are some of the tentative conclusions contained in a draft report of a study of the classification and disciplinary procedures used in the Adult Correctional Institution, Cranston, R.I., which was undertaken by the Harvard Criminal Justice Center.

[404] *Id.*

[405] Brief for Appellee at 25, Sostre v. McGinnis, 422 F.2d 178 (2d Cir. 1971).

[406] 312 F. Supp. 863 (S.D.N.Y. 1970).

[407] 314 F. Supp. 1014, 1028 (S.D.N.Y. 1970).

[408] 328 F. Supp. 165 (D. Md. 1971). This requirement was originally ordered by the court in its interim opinion of March 2, 1971. The subsequent opinion did not order the adoption of such an adjudication but noted that the correctional officials had just adopted new rules which set up "reasonable guidelines." These rules call for hearing examiners from the Department of Corrections, who are not members of the staff of any institution, to be employed in determinations involving serious rule violations.

evidence requirement by avoiding institutional loyalties and conflict of interest in the decision making body. Moreover, his role would undoubtedly imbue the inmates with a greater confidence in the fairness of the system to which they are exposed. Certainly, the suggestion that hearings now involve little more than institutional officials' acceptance of testimony by guards indicates that the presence of an outside adjudicator would benefit the search for truth in the disciplinary process. Thus, even though the disciplinary process might not really be one of fact-finding, the impartial adjudicator could still insure that proper investigation is undertaken in those cases where he has even a small doubt of the accuracy of the accusation.

On the other hand, employment of an outsider or perhaps a small number of people who alternately assumed this role would be costly; and it would undoubtedly cause inconveniences and delays in coordination of activities. In addition, if it became apparent to guards that their accusations were no longer accepted pro forma, it would be easy for them to evade the formal disciplinary process in their day-to-day contact with and control over the inmates and to apply their own sanctions. Such practices could include hazing, arbitrary denial of privileges, beatings, or possibly enticement of prisoners into rule violations. Unfortunately, one study shows that even under an elaborate procedural system this is a very real possibility.[409]

Unless an impartial adjudicator is present in a disciplinary hearing, one might question the suitability of due process procedures designed to insure fair fact-finding because with the present composition of disciplinary boards, many members of which have at least a professional rapport with the accusing witnesses, one could hardly expect an impartial determination. Indeed, perhaps even with an impartial person present, more than mere acceptance of the guard's or administrator's accusation, cannot be expected, regardless of what procedures are followed.

4. The Right to Call Witnesses; Confrontation; Cross-Examination

The reason offered against giving an inmate the opportunity to call witnesses is that such a right could be abused by a powerful inmate who could get any number of inmates to testify on his behalf.[410] Nevertheless, prison officials who were part of the hearing board could reasonably limit the number of inmates who could appear; and because of their knowledge of the institution, the accused, and the witnesses, these same administrators could, if necessary, discount testimony.[411] Moreover, any reasons for so doing could be communicated to any outside members of the board. There-

409 *Supra* note 403.

410 Jacob, *supra* note 53, at 247-48.

411 *Id.*

fore, the reasons offered do not seem sufficient to deny this protection completely, since it might assist in obtaining a more accurate view of the truth and would help to alleviate the natural disadvantage the inmate faces in such a hearing.

The major reason given for denying confrontation of adverse witnesses and cross-examination is that these practices would tend to place the inmate and official on the same level, to the detriment of the institution.[412] Such practices, however, have not proven troublesome in the Federal Bureau of Prisons, where they now operate.[413] Moreover, the *Task Force Report* recommends that these procedures are appropriate, particularly since they might help achieve the image of the inmate and the staff working together in the process of rehabilitation. Indeed, this objection would further evaporate if a staff member or a law student represented the inmate because then the inmate would not directly cross-examine or question a staff member.

Although neither the *Model Penal Code* nor the *Manual of Correctional Standards* would require any of these procedural protections, the federal prisons employ all of them without difficulty in serious disciplinary adjudications.[414] Thus, requiring these procedures would seem to be the better practice, even if they were not constitutionally mandated. The *Task Force Report* forcefully provides the rationale:

> Yet it is inconsistent with our whole system of government to grant . . . uncontrolled power to any officials, particularly over the lives of persons. The fact that a person has been convicted of a crime should not mean that he has forfeited all rights to demand that he be fairly treated by officials. . . .
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> [Moreover, a] person who receives what he considers unfair treatment from correctional authorities is likely to become a difficult subject for reformation. And the "collaborative regime" advocated in this volume is one which seeks to maximize the participation of the offender in decisions which concern him, one which seeks to encourage self-respect and independence in preparing offenders for life in the community.
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> . . . .
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> Where such charges may lead to a substantial loss of good time and a resultant increase in the actual length of imprisonment, the prisoner should be given reasonable notice of the charges, full opportunity to present evidence and to confront and cross-examine opposing witnesses. . . .[415]

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412 This reason was suggested by Judge Wyzanski in *Nolan v. Scafati*, 306 F. Supp. 1 (D. Mass. 1969).

413 Hirshkop and Millemann, *supra* note 395, at 834.

414 *Id.*

415 TASK FORCE REPORT, *supra* note 11, at 83, 86.

5. Record Keeping and Review

A recorded hearing and review go together because without any record an administrator could not adequately review a board decision. In addition, records of previous hearings would probably be of assistance in meting out punishment in any new hearing. Many systems now provide for such a record and review. Currently, decisions are appealable to the Director of the Bureau of Prisons[416] in federal prison hearings, to the warden or associate wardens in Missouri,[417] and to the warden in Rhode Island.[418] Thus, it does not appear that any insurmountable practical problems bar these practices. Moreover, such review would seem to provide a greater sense of fairness to the hearing and consequently be an aid in achieving the collaborative regime. Nevertheless, as long as the reviewing individual is a prison official, review would seem to be of minimal value if the evidence to be disregarded was the word of a staff member because of the same reasons that a substantial evidence requirement would be ineffective. But the power to alter or commute any punishments does not seem to be quite so burdened.

IX. VISITORS

A. *The Present State of the Law*

Visitation rights of prisoners have been generally left to the discretion of the warden as a privilege and not a right. Normally, "visitors generally must be on the inmate's approved visitors' list"[419] and usually the visitation list is nearly identical to the inmate's "correspondence list."[420] Thus,

> The *Iowa Code* requires that certain state officials and religious leaders be allowed to visit the state correctional institutions . . . . Other persons may visit only with the permission of the Warden. . . . All Iowa institutions limit visitors to individuals on the inmate's approved correspondence list. These are individuals who are carefully screened in terms of security and character before they are placed on the list. Rules [prohibit] physical contact and the giving of gifts . . . .[421]

For the Massachusetts Correctional Institute in Walpole, the *Inmate Rules and Regulations* state:

> Visits are considered a privilege, not a right, and violation of any rule governing the visiting room shall be cause for suspension of visiting privileges. You will be permitted two visits a week from your relatives and friends, each visit not to exceed one hour. All visits are subject to the ap-

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416 Jacob, *supra* note 53, at 242.

417 *Id.* at 244 n.45.

418 Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970).

419 Jacob, *supra* note 53, at 240.

420 Note, *supra* note 58, at 682. *See* IOWA CODE § 246.46 (1969).

421 Note, *supra* note 58, at 681-82.

> proval of the Superintendent . . . . You must conduct yourself with dignity while in the visiting room so you are cautioned against bodily contact. Your conversations should be modulated so as not to annoy others.[422]

Just as at Walpole and in Iowa, many strict rules govern visitation behavior elsewhere.

> Many institutions further restrict visiting privileges by insisting that both the inmate and the visitor conform to certain modes of behavior. Thus, in Tennessee during a visit, "No foreign language will be spoken." And, "Embracing, handshaking or other body contact with a visitor is forbidden."[423]

The case law in this area is sparse and seemingly places no limitation on a prison official's discretionary grant or denial of visitation. In fact, only one case has been found where visitation was considered a right or where a denial of visitation privileges was overturned.[424] There is also one reported decision in which a court implied a reasonableness test. In *Davis v. Superior Court*,[425] the court discussed the warden's restriction of access to death row inmate Caryl Chessman. In dicta the court stated:

> [A]n absolute isolation of those incarcerated in a penal institution by a ban on communication by them with the outside population would constitute an unreasonable exercise of . . . power . . . . Reasonable rules prohibiting visitations or communication will stand.[426]

During 1971 another case involving visitation rights was decided and the court ordered substantially greater visitation opportunities to the inmates than they previously had enjoyed.[427] In *Jones v. Wittenberg*[428] the court declared that conditions in the Lucas County, Ohio, jail subjected the inmates therein to cruel and unusual punishment. One of the many unsatisfactory conditions which the court found was the jail's visitation policy. The court noted that:

> Visitation is very highly limited. Prisoners are permitted visits only on Saturday afternoons from one to four o'clock p.m. Visits by children under eighteen are not permitted. All visits must be conducted by conversing through the heavy screening of the cell-blocks, with both parties stand-

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[422] HARVARD PRISON LEGAL ASSISTANCE PROJECT TRAINING MANUAL at 67. This is an excerpt from the prison rules which are given to the inmates at Walpole Prison in Massachusetts.

[423] Jacob, *supra* note 53, at 240.

[424] United States *ex rel.* Raymond v. Rundle, 276 F. Supp. 637 (E.D. Pa. 1967).

[425] 175 Cal. App. 2d 8, 345 P.2d 513 (1959).

[426] *Id.* at 20, 345 P.2d at 521.

[427] In Seale v. Manson, 9 CR. L. REP. 2209 (D. Conn. May 5, 1971), Bobby Seale and Erika Huggins contended, *inter alia*, that as unconvicted detainees they had a constitutional right to correspond with and to see friends and business associates without restriction. The court rejected this claim and also held that the plaintiffs had no constitutional right to be interviewed by members of the press. The court specifically noted that unfettered mail and visitation privileges would seriously hamper prison security and discipline.

[428] 323 F. Supp. 93 (N.D. Ohio 1971).

> ing, usually in groups of as many as three prisoners at a time. There is no semblance of any privacy. Trustees have somewhat greater visiting privileges.[429]

In a subsequent decision, rendered after a further hearing concerning the relief to which plaintiffs were entitled, the court ordered, *inter alia*:

> *Establishment of visiting programs*, which shall include daily visiting hours, both in the daytime and in the evening, and especially upon holidays and weekends; the provision of much more adequate physical facilities for visitation; removal of the limitations on visits by children and by persons not members of the prisoner's immediate family; and provisions for limitation or removal of visiting privileges for disciplinary purposes, or for abuse of visiting privileges.[430]

B. *Analyses and Suggested Practice*

The *Coffin* view in this area of inmate rights fits very closely with the *Task Force Report's* notion of the "collaborative regime," in which both inmates and staff structure themselves in a "partnership . . . in the process of rehabilitation."[431] Such a concept

> tries to oppose the tendency for an institution to become isolated from the community physically and in terms of values, and instead seeks to assimilate inmates in normal noncriminal ways of life, partly through close identification with staff and partly through increased communication with the outside community.[432]

This should be done only with such minimal additional rules as are essential to meet the conditions peculiar to the institution.[433] Certainly visitation increases communication with the outside and should for this reason be encouraged. One would suppose that there should be strong reasons for denying visitation.

Proceeding under a *Coffin* rationale, one would reason that a sentence of imprisonment does "by necessary implication" withdraw the right of freedom of movement and implies close confinement. Consequently, release of the prisoner for furlough, for work, or for conjugal visits[434] is not the kind of visitation right which an inmate retains while incarcerated, at least as long as he remains within the traditional type of custodial prison. This presumes, of course, that there would be no equal protection problems in which such opportunities were granted to some but not to all inmates within a particular classification.

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[429] *Id.* at 96.

[430] 330 F. Supp. 707, 717 (N.D. Ohio 1971).

[431] TASK FORCE REPORT, *supra* note 11, at 47.

[432] *Id.*

[433] *Id.* at 50.

[434] For a case sustaining the denial of such a right see Payne v. Dist. of Columbia, 253 F.2d 867 (D.C. Cir. 1958).

But what about visits to the inmate while he is in the institution? Undoubtedly, in most cases visitation increases chances of rehabilitation and helps to avoid the situation where "the traditional prison and many juvenile training schools [which are isolated, punitive, and regimented] develop a monolithic society, caste-like and resistive to change."[435] Increased visitation which reduces isolation from the community follows the Crime Commission's recommendation that "Liberalization of policies governing visits and letters for inmates is also helpful and can be used even for inmates who cannot be released."[436] Moreover, restrictions or denial of visitation curtails rights of the visitors who wish to see inmates. This consideration indicates that visitation rights are not properly denied at the whim of prison administrators.

One commentator suggests that the due process clause appears

> to require that the warden's prohibition of visitors be reasonable. Arbitrary restrictions or the denial of all visitors, in the absence of compelling security reasons, would constitute abuse of this discretion.[437]

Such a view seems appropriate in the prison context. Exceptions even to the test of reasonableness, however, would seem to exist for visitation by ministers and attorneys. Visiting rights in these cases should be absolute.[438] Of course, even these visits would be subject to reasonable regulation as to time and place in order to protect the state's legitimate interest in the smooth administration of the prison—unless an emergency arose in which the attorney might require immediate access to the inmate.

General visitation rights should not be taken from a prisoner arbitrarily; a prison sentence does not imply or necessitate such a practice. Reasonable regulation of visiting privileges involves at least the following considerations: (1) space available in the prison, (2) meal hours, (3) normal work schedules, (4) staff available to search visitors for contraband and weapons (just as in mail cases), and (5) time of day. All of these are valid considerations in regulating the time, place, and number of visitors, but this regulation certainly must be rationally related to the end sought and does not provide justification to prohibit visitation altogether or to restrict people who could visit. Perhaps in unusual cases an official could offer sufficient additional reasons for excluding a person from visitation, but a general restriction, such as no persons with criminal records or no female visitors who are not a wife, sister, or mother, appears unwarranted. Although visits by certain persons might be detrimental to rehabilitation, the position that visitation by anyone of a certain class will always have a detrimental effect on an inmate cannot be justified. Moreover, the *Coffin* view would re-

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435 TASK FORCE REPORT, *supra* note 11, at 46.

436 *Id.* at 56.

437 Note, *supra* note 58, at 682.

438 These rights are discussed in Section II on Religion beginning at note 72 *supra* and in Section III on Access to the Courts beginning at note 128 *supra*.

quire prison officials to demonstrate why a visit by a particular individual would be detrimental to the inmate before they could prohibit it.

Another consideration relevant to visitation is the nature of the prison. A minimum security institution would obviously need fewer restrictions on visitation than one housing men who are disciplinary problems. Perhaps the most difficult question in this area is whether misbehavior by an inmate is sufficient reason to curtail visitation, at least for some time period.[439] Since it is evident that an official should not be able to eliminate visitation entirely, visitation should be viewed as a right subject to due process limitations and not merely a privilege.[440] After all, instead of eliminating visitation, the authorities can employ a variety of other disciplinary measures which do not curtail a retained right or eliminate a practice beneficial to rehabilitation. The better practice would be to allow the deprivation of visitation only when the misbehavior relates to the visit itself, and then only temporarily. Perhaps that power should be left to the reasonable discretion of the officials, but there is no valid reason why courts should be reluctant to scrutinize any decision which hinders visitation beyond reasonable limits, especially if the burden of justifying such a decision properly rests with the official.

X. THE RIGHT TO RECEIVE TREATMENT

A. *Rehabilitation: A Goal to Corrections*

> The focus of this volume . . . is on rehabilitative treatment, and specifically on methods for reintegrating the offender into the community . . . . . The ultimate goal of corrections under any theory is to make the community safer by reducing the incidence of crime. Rehabilitation of offenders to prevent their return to crime is in general the most promising way to achieve this end.[441]

Reformation has long occupied a place in correctional theory as one of the ends of imprisonment. It was in the late eighteenth century that correctional theory began to emphasize two new ends of imprisonment: "One of these was humanitarianism . . . . The other was reformation . . . ."[442] Today, though, the major purpose of incarceration seems to be rehabilitation of the offender.[443] However, there is no judicially recognized right

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[439] *See* the court's order in Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), which adopted this practice.

[440] *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[441] TASK FORCE REPORT, *supra* note 11, at 16.

[442] *Id.* at 3.

[443] "While the constitutional prohibition in the Eighth Amendment against cruel and unusual punishment is something which only recently has drawn particular attention, there is no question that rehabilitation, not revenge, must be the principle aim of penology." Nolan v. Smith, Nos. 6228, 6272 (D. Vt. June 29, 1971). *See also* Brown v. Peyton, 8 CR. L. REP. 2367 (4th Cir. Feb. 3, 1971).

of a prisoner to receive treatment or to have the state make any effort toward his rehabilitation. Recognition of such a right would provide impetus for the treatment of offenders and for their reform and ultimate return to society as productive members of the community.

B. *The Right to Treatment in Other Areas*

In the past few years a number of courts have begun to recognize that a right to treatment exists for certain groups of people who have been deprived of their liberty. Initially, the right was limited to criminally committed mental patients[444] and juvenile offenders.[445] In *Rouse v. Cameron*,[446] the first case to recognize the existence of this right, the plaintiff was an inmate of a mental hospital who had been involuntarily committed after acquittal by reason of insanity for the offense of carrying a pistol. The court held that he had a right to receive treatment and remanded the case for a hearing and findings as to whether the plaintiff was receiving adequate treatment. This decision was based primarily upon a statutory right to treatment expressed in the 1964 District of Columbia Hospitalization of the Mentally Ill Act.[447] A year later, the same court decided two cases dealing with juvenile offenders. In *Creek v. Stone*,[448] the appellant had been arrested and sent to a juvenile home to await trial. The court liberally interpreted the provisions of the Juvenile Court Act[449] to place the state in the position of *parens patriae* and said that the rehabilitative purposes of the statute comprehended psychiatric care.[450] Then, in *In re Elmore*,[451] a case in which a 15 year old offender claimed that he was not receiving treatment, the court remanded the case for an evidentiary hearing, indicating that:

> [S]hould it develop that the need for professional care persists, the Juvenile Court will then proceed to evaluate the present confinement in light of the standards announced in *Creek*, utilizing its expertise and discretion secure in the knowledge that it is amply authorized to fulfill the rehabilitative purposes of the Act.[452]

Since these early decisions, the right to treatment has received much

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444 Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Maatallah v. Warden, 86 Nev. 430, 470 P.2d 122 (1970).

445 *In re* Elmore, 382 F.2d 125 (D.C. Cir. 1967); Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967).

446 373 F.2d 451 (D.C. Cir. 1966).

447 D. C. CODE ENCYCL. ANN. § 21-562 (Supp. V, 1966).

448 379 F.2d 106 (D.C. Cir. 1967).

449 D. C. CODE ENCYCL. ANN. § 16-2316(3) (Supp. V, 1966).

450 379 F.2d 106, 109 (D.C. Cir. 1967).

451 382 F.2d 125 (D.C. Cir. 1967).

452 *Id.* at 128. For a recent controversy involving treatment under the District of Columbia Youth Corrections Act, see United States v. Lowery, 10 CR. L. REP. 2195 (D.D.C. Dec. 10, 1971); United States v. Alsbrook, 10 CR. L. REP. 2185 (D.D.C. Dec. 1, 1971).

comment[453] and subsequent decisions have enlarged it to include one sentenced to an indefinite term as a sex offender,[454] a civilly committed mental patient,[455] and one who had been judged incompetent to stand trial and confined to a mental hospital.[456] Additionally, one court dismissed a prayer for a mandatory injunction compelling an effective rehabilitation program for chronic alcoholics only because it held that a state could comply with constitutional requirements by electing not to confine them.[457]

C. *Approaching a Right to Treatment For Inmates*

A few cases have been litigated in which persons housed in regular prisons have claimed the right to treatment, but all have involved either juveniles or persons who had in some way been declared mentally ill. In Pennsylvania, two boys, who were adjudged defective delinquents with criminal tendencies and were incarcerated in the State Correctional Institution at Dallas, brought suit alleging a lack of treatment.[458] The court rejected their claim of a right to receive treatment and held that treatment was not required because the boys were confined in a penal institution. The court distinguished *Rouse* on the grounds that the "constitutional discussion in *Rouse* is dictum only since the court really relied on a federal statute requiring that persons 'hospitalized in a public hospital for mental illness' receive medical and psychiatric care."[459] It appears that the court ignored the *parens patriae* notion contained in the juvenile sentencing process, on which the District of Columbia court relied in both *Creek* and *Elmore*. A contrary result was seemingly reached in a 1970 case in which an inmate of a Nevada state prison obtained a hearing to determine if he was getting proper treatment under a statute committing him for "detention and psychiatric treatment" after he had been found insane and unable to stand trial.[460] The court noted that "[t]reatment is not a matter of discretion and apparently may be forced by appropriate order."[461]

Finally, one other case considered the issue of treatment for an inmate and discussed briefly the right to treatment and rehabilitation of one sentenced under a criminal statute and transferred to a mental hospital. In *United States ex rel. Schuster v. Herold*,[462] a habeas corpus action by a New

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[453] *See, e.g.*, Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969) [hereinafter cited as Bazelon]; Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87 (1967).

[454] People v. Wilkins, 23 App. Div. 2d 178, 259 N.Y.S.2d 462 (1965).

[455] Dobson v. Cameron, 383 F.2d 519 (D.C. Cir. 1967).

[456] Nason v. Supt. of Bridgewater State Hospital, 353 Mass. 604, 233 N.E.2d 908 (1968).

[457] Rakes v. Coleman, 8 CR. L. REP. 2056 (E.D. Va. Sept. 28, 1970).

[458] Commonwealth v. Williams, 432 Pa. 44, 246 A.2d 356 (1968).

[459] *Id.* at 61, 246 A.2d at 365.

[460] Maatallah v. Warden, 86 Nev. 430, 432, 470 P.2d 122, 123 (1970).

[461] *Id.* at 433, 470 P.2d at 123.

[462] 410 F.2d 1071 (2d Cir. 1969).

York state prisoner challenging the legality of his transfer from Clinton Prison to Dannemora State Hospital, the inmate raised the issue of his right to receive treatment. The court said that although a procedural barrier prevented it from deciding this "highly significant question" and

> [w]hile these cases [*Rouse* and *Creek*, *inter alia*] deal with persons who are not currently under a sentence of imprisonment as Schuster is, it may be that this difference in and of itself does not provide an adequate basis for denying him the same protections. The incidence of having been convicted of a crime surely does not deprive a person of all constitutional protections for the duration of his sentence . . . . While we do not pass upon the possibility of such a constitutional right to treatment, we are of the view that . . . the state may wish to reexamine the validity of its confinement of Schuster . . . .[463]

Even though many of the cases cited above dealt with a statutory basis for the right to receive treatment, the reasons for such a right are generally as applicable to prisoners as to mental, juvenile, or sex offenders. Indeed, recent comments by Judge Bazelon, author of *Rouse*, are in many ways applicable to the prisoner's case, even though he admits that on some grounds prisoners situations may be distinguishable.

> The rationale for the right to treatment is clear. If society confines a man for the benevolent purpose of helping him . . . then its right to so withhold his freedom depends entirely upon whether help is in fact provided. . . . But whenever care is simply custodial, we must be certain beyond a reasonable doubt . . . that the individual truly could not hope to care for himself. . . . Whatever justification we may find in theories of retribution or general deterrence for confining a convicted criminal, the case is quite different when the individual has committed no crime. . . .
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> . . . .
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> . . . Courts cannot force legislatures to provide adequate resources for treatment. But neither should they play handmaiden to the social hypocrisy which rationalizes confinement by a false promise of treatment. . . .
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> . . . .
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> . . . When the legislature justifies confinement by a promise of treatment, it thereby commits the community to provide the resources necessary to fulfill the promise.[464]

With a major goal of incarceration being rehabilitation "to prevent their return to crime," any recognition of a right to treatment for inmates could make the community realize that it is "committed to provide the resources" which it is not now furnishing to prisoners. Furthermore, recognition of this right could enable the courts to direct administrative officials to provide training, counselling, education, and other rehabilitative services. Moreover, a threat of possible release by habeas corpus might provide a sufficient impetus to legislatures to increase resources for correc-

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[463] *Id.* at 1088.

[464] Bazelon, *supra* note 453, at 748-49.

tional rehabilitation programs.[465] Even though there is no single program generally recognized for successful rehabilitation of offenders, a program could certainly be provided which was "within the range of appropriate treatment alternatives." Since no program of treatment or rehabilitation can in any way guarantee successful results to the inmates, the right to treatment must comprehend only the right to participate in a reasonable treatment program provided by the prison. Such a program must certainly include the medical treatment of drug addiction because that is a major reason for criminal behavior. Therefore, the rehabilitative goal of incarceration suggests that an inmate has a right to receive some form of treatment because he has lost his freedom for just this purpose.

D. *Statutory Authority*

Many would point out, however, that the treatment cases which have recognized such a right have all been at least partially based upon statute. But few have recognized that there does exist a strong basis in correctional statutes, both federal[466] and state,[467] for the recognition of an incarcerated

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[465] *See* 84 HARV. L. REV. 456, at 462-63 (1970), where it is suggested that a threat of possible release of Arkansas inmates spurred legislative action.

[466] Statutes dealing with the federal correctional system speak of the purposes and goals of the federal prisons.

> 18 U.S.C. § 4001 (1970): The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.
>
> 18 U.S.C. § 4081 (1970): The Federal penal and correctional institution shall be so planned . . . as to facilitate the development of an integrated system which will assure . . . such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed. . . .
>
> 18 U.S.C. § 5003(a) (1970):
>
> The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses. . . .

[467] Various state statutes provide even more clearly that a major legislative purpose of the state correctional system is rehabilitation and direct that it be provided. The Vermont statutes are probably the ones most clearly authorizing such a right. These purposes are set forth in a special act which was passed in 1966.

State correctional policy, 1966, No. 24, § 1:

> The State of Vermont intends to develop its correctional institutions and programs on the policy basis that society is best and most effectively served by the adoption of a correctional program designed to:
>
> (1) Protect persons and property against violators of criminal laws.
>
> (2) Deal with violators of criminal laws with treatment designed to prepare and induce them to become useful citizens of the state and community, foster their human dignity, and preserve the community's human resources.

This policy is based upon the cumulative experience of modern correctional practice which undertakes to build sound correctional programs to square with the facts that, first, almost all criminal violators do return to the open society and, second, that traditional institutional prisons not only fail to reform or rehabilitate but operate to increase the risk of continued criminal acts following release. It is recognized that sole or even primary reliance upon closed, custodial institutions is self-defeating and also results in wasteful high costs to the taxpayers of the state. The alternative is a comprehensive program which, while providing necessary closed custodial

offender's right to treatment and rehabilitation. In many instances such a statutory right is as clear as the one recognized in *Rouse* or even stronger than the one in the District of Columbia Juvenile Court Act, which provided only that the state held the juvenile as if it were a parent.

E. *The Rationale for a Right to Treatment*

Society sentences an offender partially in an attempt to cure his criminal habits and legislatures have indicated that the prisoner is to receive treatment and to benefit from rehabilitative programs. In both the juvenile and mental offender areas, these same factors have provided sufficient basis for a judicially recognized right to treatment.[468] Indeed, in all three instances there is the same interest in protecting society by confining a person who is deemed to be dangerous and whose behavior needs modification. If all this is true, how can the prisoner's situation be distinguished from that of the juvenile or mental offender?

Only two of the incarcerative purposes,[469] deterrence and vengeance, would seem to distinguish the cases. But is this enough to deprive the inmate of a right to receive therapy and treatment and perhaps of his re-

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confinement for hardened and habitual offenders, will implement as its primary objective the disciplined preparation of violators for their responsible roles in the open community.

Such a program, calculated to serve that objective, will have many parts. A range of facilities for the treatment of different classes of offenders is necessary. VT. STAT. ANN. tit. 28, § 101 (1970) (historical note). Vermont is not the only such state. In fact, many statutes provide for rehabilitation and treatment, for example, Delaware and Ohio.

DEL. CODE ANN. tit. 11 (Supp. 1970):

> § 6501. A Department of Correction is established to provide for the treatment, rehabilitation and restoration of offenders as useful, lawabiding citizens within the community.
>
> § 6517(a). The Commissioner shall carry out and provide for: The custody, study, training, treatment, correction and rehabilitation of persons committed to the Department.
>
> § 6531. Persons committed to the institutional care of the Department shall be dealt with humanely, with effort directed to their rehabilitation, to effect their return to the community as safely and promptly as practicable. The Commissioner shall establish the following programs . . . education, including vocational training; work; case work counselling and pyschotherapy. . . .

OHIO REV. CODE ANN. (Page 1970):

> § 5145.03. The department of mental hygiene and correction . . . shall make such rules and regulations for the government of prisoners as tend to promote their reformation, or be necessary for the purpose of sections 5145.01 to 5145.27, inclusive, of the Revised Code.
>
> § 5145.04. The department . . . shall maintain such control over prisoners committed to its custody as may prevent them from committing crime, secure their self-support, and accomplish their reformation.
>
> § 5119.17. Persons sentenced or committed to any institution . . . are committed to the control, care, and custody of such department. . . . [T]he chief of the division . . . shall assign such person to a suitable state institution or place maintained by the state within his division, there to be confined, cared for, treated, trained, and rehabilitated until released. . . .

See also ARK. STAT. ANN. §§ 43-100 (1969); ILL. ANN. STAT. ch. 108, § 10 (Smith-Hurd 1972); N.Y. CORREC. LAW §§ 70-71 (McKinney Supp. 1971).

[468] *In re* Gault, 387 U.S. 1, 22 n.30 (1967).

[469] *See generally* TASK FORCE REPORT, *supra* note 11.

turn as a useful member of society? The usefulness of deterrence in incarceration would seem to be more in the length of confinement and in the certainty of apprehension, rather than whether or not an inmate is provided reasonable treatment. Consequently, vengeance in denying treatment remains as the only interest weighing against treatment. Although the cost of any treatment program is a valid consideration, it is a legislative problem that exists also for the other groups. At least in the states where the legislature has already made a statutory commitment to treatment, it would seem that costs would not completely deny this right, for "[w]hen the legislature justifies confinement by a promise of treatment, it thereby commits the community to provide the resources necessary to fulfill the promise."[470]

If the *Coffin* view of prisoners' rights is followed, it becomes apparent that the differences between adult prisoners and juveniles or mental patients cannot be enough to deprive the inmates of reasonable treatment efforts, for certainly it is not implicit in confinement that an inmate must be deprived of the opportunities to educate, train, and rehabilitate himself. Instead, it is often made explicit that he is to receive such treatment. Moreover, since the primary goal of incarceration is to rehabilitate the offender, the purposes of incarceration, except perhaps the vengeance of society, are not served by the denial of rehabilitative programs. Therefore, with the existence of an adequate legal theory to justify a prisoner's right to receive treatment[471] and with the obvious fact that society could only gain from

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[470] Bazelon, *supra* note 453, at 749.

[471] Some recent cases suggest an alternative approach to the establishment of a right to treatment; namely, that the eighth amendment implies that incarceration is cruel and unusual punishment if the prison does not provide at least some reasonable level of treatment facilities. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) held the conditions in the Arkansas prison system constituted cruel and unusual punishment. The lack of rehabilitation services and facilities was considered "a factor in the overall constitutional equation before the Court." 309 F. Supp. at 379. In Bryant v. Hendrick, 7 CR. L. REP. 2463 (Phil. Ct. C.P., Pa., Aug. 11, 1970), a case closely paralleling *Holt*, the court held that conditions in Holmsberg prison violated the eighth amendment. The court particularly noted as a portion of the evidence affecting its decision "the lack of any rehabilitation program" at 2463. Thus, one sees as a seminal theory of constitutional law that failure to provide rehabilitation and treatment may be a cruel and unusual punishment, particularly if other factors in prison are detrimental to the prisoner's rehabilitation. Consistent with this line of reasoning the court in *Holt* indicated that:

> The absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation.

309 F. Supp. at 379. A recent Harvard Law Review case note implies that at a minimum the state has a duty to provide an inmate with rehabilitative services, consistent with the theories of *Holt* and *Bryant*:

> To hold that an absence of rehabilitation efforts constitutes cruel and unusual punishment would be to read a particular theory of criminal punishment into the Constitution. Yet present recidivism rates make it seem highly doubtful that a state should be free to experiment with a penal program that offers no rehabilitation whatsoever. Imprisonment in an environment practically guaranteed to make the prisoner less useful to himself and society hardly seems humane or functional, though it occurs all too frequently.

84 HARV. L. REV. 456 at 461-62. This theory is given additional support by the concurrence

recognition of it, is it not time for our courts to recognize the right to rehabilitative treatment?

XI. CONCLUSION

One of the themes recurring through the sections of this article has been that prisoners are no longer slaves of the state[472] and that correctional officials must justify practices which curb their rights and are not essential for their physical custody. It is asserted that the movement toward increased judicial intervention and the acceptance of the *Coffin* notion of retained rights are desirable trends, for in many instances the resulting greater freedom enhances rehabilitation and comes closer to achieving the desired "collaborative regime."[473] Moreover, in many of these areas of prison law the test for deciding what is "by necessary implication"[474] taken from an inmate has emerged as a kind of balancing process, which weighs inmate interests against realistic correctional needs. Application of this kind of analysis to prison law indicates that inmates' rights should be expanded and that prison officials must accommodate this change. Only when a legitimate correctional interest can be put forward for withdrawing a right and not be outweighed by other interests can the deprivation of that right be justified. What then are the proper limits on inmate rights and what values justify the abrogation of individual rights in the prison setting?

First, in some instances it would be sufficient to demonstrate by reasons or facts upon which a court can independently pass that a certain practice would cause a danger of substantial disruption of the normal prison function or that it is likely to lead to disorder or altercations. Nevertheless, such a showing should meet a strict test: in the first amendment area that includes the exercise of religious belief, possession of literature, and censorship of mail; the test would be one of a clear and present danger of physical disorder. Perhaps in the area of racial discrimination, like religious belief, no sufficient justification for withdrawal of a right can be asserted. At least as strict as "clear and present danger" is needed to out-

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of Judge Lay in the Eighth Circuit's affirmance of the district court's holding in Holt v. Sarver, 442 F.2d 304, 310 (1971) where he states: "Until immediate and continued emphasis is given to an affirmative program of rehabilitation the district court should retain jurisdiction."

Finally, other cases in which violations of the eighth amendment have been found support this theory. *See* Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), where the court found "no attempt at rehabilitation" *and* McCray v. State, 10 CR. L. REP. 2131 (Montgomery County Cir. Ct. App., Md., 1971), in which it was noted that an institution for defective delinquents must not retard rehabilitation. *See also* Nolan v. Smith, Nos. 6228, 6272 (D. Vt. June 29, 1971), where a lack of rehabilitative facilities was a factor in a finding of unconstitutional incarceration.

472 Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

473 TASK FORCE REPORT, *supra* note 11, at 47-50.

474 Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

weigh the strong commands of equal protection in racial discrimination cases.

Unfortunately, in the vast majority of cases involving the suppression of inmate rights, the asserted justification is that the practice would disrupt internal discipline and security. Thus, in a visitation case for example, the reason offered for prohibiting visits might be a lack of guards to preserve order. Nearly always, however, officials do not clearly demonstrate or prove that substantial disruption would occur, but rather only make such an assertion. It is significant that a reason seldom offered is that suppression of an alleged right will benefit an inmate's rehabilitation or that permitting the practice would adversely influence a program that is part of the overall treatment scheme.

Second, cost by itself has also been rejected as a sufficiently strong interest to justify removal of any of the rights discussed above; for in the current areas of litigation, inmate demands have not been prohibitively costly. Reasonable medical care, the provision of an adequate number of legal books in the inmate library, employment of ministers, the presence of an impartial outside adjudicator in disciplinary hearings, or special diets are not so costly to the state that they outweigh the interests dictating their provision. Additionally, when constitutional values are present, arguments that a practice is an administrative burden or that it involves great administrative costs (such as in the provision of procedural safeguards in the disciplinary process or in the work involved in the coordination of religious diets or visitation) simply cannot justify the suppression of a right, particularly if the practice can be administered in a way that eliminates the burden on the exercise of the right.[475] Consequently, administrative discretion must no longer be regarded as a justification for disallowing such rights as the provision of reasonable medical care, visitation, mail, or due process. Rather, administrative discretion must be permitted only inasmuch as it reasonably regulates the time, place, frequency, or degree of exercise of these rights.

Absolute prohibition is no longer a viable alternative; and in some areas in which special values are present, such as access to the courts, religious or political beliefs, emergency medical care, or punishment that is so base as to be cruel and unusual, the prison officials should carry a very heavy burden to justify their actions.

Furthermore, considering the areas in which prisoners' rights have been recognized and considering the preferred values of the first amendment, there are other rights that have not yet been granted the inmate but are ones that he must certainly retain. These are the freedoms of expression dealing with speech, press, and protest. Indeed, why have these freedoms not yet been recognized; they are no less favored than other first amend-

[475] Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969).

ment values. These rights undoubtedly encompass at least the right to an unfettered press, to nondisruptive speech, and to peaceful protest, at least when it does not involve disruption of the prison routine.

Perhaps a situation very analogous to inmates' rights has already been considered in another developing area of the law, student rights. In *Tinker v. Des Moines Independent School District*[476] school officials sought to prohibit a peaceful protest which consisted of the wearing of a black armband by students in protest of the Vietnam war. The reason offered for the prohibition was that it was needed to prevent the disturbance of school discipline. The Supreme Court unequivocally rejected this asserted justification, even though it noted favorably the necessity for authority to prescribe and control conduct in the schools[477]—a necessity that similarly exists in the prisons.

> But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . . Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk. . . .[478]

Although it is clear that reasonable regulation of speech-connected activities, including protest, is permitted in carefully restricted circumstances,[479] any restriction of rights encompassed by freedom of expression should be strictly scrutinized by the courts. Such a position has already been stated by courts in the cases that have applied the clear and present danger test to the possession of nonreligious literature.[480] Consequently, with the trend toward increased judicial protection of inmate rights, one would expect that this same protection would be extended into the first amendment areas of speech, press, and protest, just as in the student's rights area, at least when any action is "entirely divorced from actually or potentially disruptive conduct by those participating in it."[481] Alert correctional officials —and more correctly, the legistatives that control them—could save a great deal of effort by anticipating this latent area of litigation and the development of the law which is almost certain to occur.

Examination of the plethora of cases involving prisoners' rights, particularly with the ballooning number in the last few years, reveals that time and time again the same questions are litigated—oftentimes within the same jurisdiction.[482] This suggests that correctional officials are slow to

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[476] 393 U.S. 503 (1969).

[477] *Id.* at 507.

[478] *Id.* at 508.

[479] *Id.* at 513.

[480] *See, e.g.*, Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970).

[481] Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 505 (1969).

[482] An example of this phenomenon recently occurred in the courts of the First Circuit. In

adopt new practices and procedures consonant with the developing law and that they must be prodded into doing so. Indeed, the administrators seem almost afraid of litigation and do not seem to understand the law or the implications to be drawn from it. Thus, it would certainly benefit all concerned if they could either anticipate the development of the law or at least attempt to conform their practices to recent court rulings without the necessity of litigating the same issues time and time again in numerous jurisdictions. This practice would decrease the load on the courts, absorb less administrative time of the prison in litigation, and presumably help the inmates. Consequently, it would be desirable to adopt precedures that would make correctional officials more aware of recent legal developments.

Although any real discussion of how officials could be made more aware of the development of correctional law lies outside the scope of this article, the possibilities include promulgation of regulations governing specific areas of correctional practice, perhaps in the form of a model correctional procedure, or distribution of guidance manuals, which would suggest how practices should be altered to conform to recent developments. Perhaps an even more desirable change would be to hire legal personnel to work in prisons because they could provide greater flexibility than written rules. Some programs like these have already been instituted in various correctional systems and more of them might provide ways to fill the gap in legal

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the summer of 1970 the Court of Appeals held that Daniel Nolan's mail to the A.C.L.U. could not be stopped. Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970). In the early fall of the same year the District Court for Rhode Island ordered wholesale changes in the state prison's mail regulations, including a prohibition on interference with mail to courts and attorneys. Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970). Yet in early 1971 the District Court for Massachusetts had to order that Michael Meola's mail to the courts could not be withheld or censored. Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971). The warden at Walpole told Donald Linky, a member of the Harvard Voluntary Defenders, soon after this case that he interpreted the court order to apply only to Meola's mail. (This was learned from a conversation the author had with Mr. Linky.) A few weeks later the Massachusetts District Court ordered that Ben Tyree, another Walpole inmate, had a right to send mail to the courts. Tyree v. Fitzpatrick, 325 F. Supp. 554 (D. Mass. 1971). In April, 1971, yet another case granted injunctive relief against the censorship of correspondence between a Massachusetts inmate and his attorney. Marsh v. Moore, 325 F. Supp. 392 (D. Mass. 1971). In Maine a mail censorship case was partially settled by a consent decree, but prison officials refused to adopt the judge's suggestion that they open and inspect inmates' incoming court and attorney mail only in the inmates' presence. In response, the judge ordered his suggestion adopted. The suit and its consent decree were the catalysts for the adoption of a policy of not censoring inmate-attorney correspondence. Smith v. Robbins, 328 F. Supp. 162 (D. Me. 1971), *aff'd*, 10 CR. L. REP. (1st Cir. Jan. 18, 1972). Apparently a new chapter in this story has begun, for this past fall the First Circuit ordered Massachusetts correctional authorities to permit Daniel Nolan to send letters to the press concerning prison matters. Nolan v. Fitzpatrick, 10 CR. L. REP. 2106 (1st Cir. Nov. 4, 1971).

Perhaps much of this litigation could have been avoided if one of the initial suits had been a class action, which is now permitted by many courts. Although extended discussion of the merits of a class action is beyond the scope of this article, such suits would certainly assist in preventing situations such as that outlined above. Apparently many courts agree, for the current majority view seems to be that inmate suits under 42 U.S.C. § 1983 are properly maintainable as class actions. For opposing views, *compare* Nolan v. Smith, No. 6228 (D. Vt. June 29, 1971); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Valvano v. McGrath, 325 F. Supp. 408 (E.D.N.Y. 1971); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio (1971)) *with* Heckart v. Pate, 9 CR. L. REP. 2228 (N.D. Ill. April 30, 1971); Shank v. Peterson, 8 CR. L. REP. 2397 (E.D. Wis. Jan. 12, 1971).

understanding. If it is unfeasible to hire full or part-time lawyers, then perhaps law students or members of large firms acting in a pro bono capacity could offer effective counsel to the administrators. In any event, a legal education program should not be limited to the warden, but should extend to every level of prison official including guards, who are most closely involved in administering the inmate rights.

In addition to recent legal commentary, many cases confirm the fact that most correctional institutions still operate on custodial principles and often grossly infringe upon the exercise of many rights. Possibly the very nature of custodial duties makes it difficult for prison officials to be sensitive to prisoners' interests. Therefore, it may be desirable to establish independent bodies to review the operation of regulations within each prison and to investigate inmate complaints, particularly with respect to alleged denials of constitutional rights. An independent body, free from any departmental bias could not only review the conformity of prison practices to the law, but could also consider the desirability of any regulation, its relationship to rehabilitation, and whether it necessitates the repeated deprivation of a right.

In sum, it is evident that many current correctional practices infringe upon inmate rights and that the reasons asserted for such practices are insufficient to justify these deprivations. Moreover, correctional officials often do not exhibit an awareness of the developments, which would enable them to adapt their outmoded practices to the new ideas and legal theories which view prisoners' rights as being no longer subject to administrative whim.